No. 78-1914

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,

Appellant,

vs.

JOHN DARRILL CONNELLY,

Appellee.

On Appeal from the Supreme Court of the State of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of this Court, appellant, Uniroyal Englebert Belgique, S.A., a Belgium corporation (hereinafter Englebert Belgique) files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment entered by the Supreme Court of Illinois in this case and should exercise such jurisdiction herein.

(A) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) Nature of the Proceedings

The underlying action was brought in a court of the State of Illinois by appellee, John Darrill Connelly, against several parties, including appellant, Englebert Belgique, seeking damages as a result of the alleged failure in the State of Colorado of an automobile tire which had been manufactured by Englebert Belgique.

This appeal arises out of the denial of a motion filed by Englebert Belgique in the Illinois court which sought to quash the service of summons on it in Belgium. Englebert Belgique asserted that it had no contact whatever with Illinois; and it objected to the assertion of jurisdiction over it by Illinois on the basis that such a procedure would violate the due process clause of the Constitution of the United States.

The final judgment of the Supreme Court of Illinois is attached hereto (App. 1-17). An initial opinion was issued by the Illinois Supreme Court on January 26, 1979, and a modified opinion was issued on March 30, 1979, upon the denial of Englebert Belgique's Petition for Rehearing; the modified opinion appears at 75 Ill. 2d 393, ... N.E.2d .....

The December 7, 1977 judgment of the Appellate Court of Illinois, First Judicial District which affirmed the denial of Englebert Belgique's motion to quash is attached hereto (App. 18-34). That opinion appears at 55 Ill. App. 3d 530, 370 N.E.2d 1189.

A timely notice of appeal, attached hereto (App. 37) was filed on June 14, 1979.

(ii) Cases Sustaining Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28 of the United States Code, Section 1257, subparagraph (2), on the ground that the decision of the Supreme Court of Illinois construed and applied a statute of that state in a manner that is repugnant to the fourteenth amendment of the Constitution of the United States.

Cases which sustain the jurisdiction of this Court include:

> *Cohen* v. *California,* 403 U.S. 15, 18, *rehearing denied,* 404 U.S. 876 (1971);
> *Winters* v. *New York,* 333 U.S. 507, 509 (1947).

In the event that this Court does not consider appeal the proper mode to review the issue involved herein, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

(iii) Constitutional and Statutory Provisions Involved

The validity of the Illinois Long Arm Statute as construed by the Supreme Court of Illinois is here involved. The entirety of that statute (Ill. Rev. Stat. 1971, ch. 110, §§ 16 & 17) is attached hereto (App. 35-36). For purposes pertinent to this appeal, that statute provides:

> "Sec. 17. Act submitting to jurisdiction—Process.
>
> (1) Any person, whether or not a citizen or resident of this State, who is person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State." (Ill. Rev. Stat. 1971, ch. 110, § 17.)

In opposition to the Illinois Supreme Court's construction of the above statute stands the due process clause of the fourteenth amendment to the United States Constitution, which is also herein involved.

(B) QUESTION PRESENTED

Whether Illinois' construction of its Long-Arm Statute, extending *in personam* jurisdiction over the non-resident appellant, violates the due process clause of the fourteenth amendment where the injury and tort cause of action occurred *outside* of Illinois and where the non-resident's *sole contact* with Illinois was the *presence* there of a component *product* it had manufactured and which had been brought into Illinois by other persons.

(C) STATEMENT OF THE CASE

The underlying action was instituted by appellee against the manufacturer and the seller of a 1969 Opel automobile and against Englebert Belgique, the manufacturer of the tires on that automobile. The Opel automobile had been purchased in Illinois by appellee's father. Both appellee and his father were residents of Illinois, and the automobile had been used there prior to the instant occurrence.

While the automobile was being driven in the State of Colorado a tire allegedly failed and appellee was injured. Appellee commenced a lawsuit in the Circuit Court of Cook County, Illinois. Summons from that court was served on Englebert Belgique in Belgium. Englebert Belgique promptly moved to quash that service of summons.

While the aforesaid motion to quash was pending in the Illinois court, appellee filed a second lawsuit seeking recovery for the same injury in the United States District Court for the District of Colorado (Action C-5451, U.S. D.C., D. Colo.). Pursuant to the provisions of the Colorado Long-Arm Statute (Colo. Rev. Stat. §13-1-124) and Rule 4 (e) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 4(e)), summons from that District Court was served upon Englebert Belgique in Belgium. Englebert Belgique has generally appeared in the District Court in Colorado.

Trial of the lawsuit in the District Court in Colorado has been postponed pending the outcome of the jurisdictional defense which Englebert Belgique raised in the Illinois Court. The discovery which the parties to those two lawsuits have undertaken is usable, pursuant to stipulation of those parties, in the Illinois or the Colorado courts.

The affidavits filed by Englebert Belgique in support of its motion to quash the Illinois summons and the subsequent discovery by the parties have established the following undisputed facts.

Englebert Belgique is a Belgian corporation with its principal place of business in Belgium. It has never registered to do business in Illinois and has never had any agent, employee or representative present there. It has never possessed or controlled any property in Illinois, nor has it maintained any office or telephone listing in that state.

Englebert Belgique has never sold any products in Illinois; nor has it shipped any products, either directly or indirectly, into Illinois. Englebert Belgique has never advertised in Illinois.

The tire involved in this action was manufactured by Englebert Belgique in Belgium. The tire was then sold to Adam Apel Akiengesellschaft, a German corporation, which

subsequently installed the tire on an Opel automobile. That automobile was then exported by General Motors Corporation to the United States and was ultimately sold in Illinois.

Englebert Belgique had nothing whatsoever to do with the tire after it was initially purchased by Opel. Every decision relating to the tires purchased by Opel from Englebert Belgique, including the type of automobiles on which they would be installed, the places where the automobiles would be sold and the persons to whom they would be sold, was made by someone other than Englebert Belgique.

Englebert Belgique was aware that some tires purchased by Opel could be installed on automobiles which might eventually be shipped to the United States. On the basis of an approximation as to the number of Opels sold in Illinois, appellee hypothesized that several thousand tires manufactured by Englebert Belgique may have been present in Illinois.

(D) DECISION BELOW

Heretofore, long arm jurisdiction over a non-resident in a cause of action sounding in tort could only be obtained, pursuant to the terms of the Illinois Long Arm Statute and consistent judicial construction of that statute, by proof that the non-resident had committed a *tortious act within Illinois*. In recognition that the instant alleged tortious act had occurred in Colorado, appellee contended in the lower courts that Englebert Belgique committed a tortious act in Illinois when the automobile, with the allegedly defective tire on it, was brought into that state. Alternatively, appellee contended that the presence of the tires in Illinois constituted the transaction of business there by Englebert Belgique.

The Circuit Court of Cook County, Illinois denied Englebert Belgique's motion to quash the service of the Illinois summons in Belgium without providing a formal statement of reasons.

The Illinois Appellate Court ignored appellee's contention that the presence of the tires amounted to Englebert Belgique having transacted business in Illinois (App. 18-34). That court held, however, that some elements of a tortious act were committed in Illinois by the distribution in Illinois of the allegedly defective tire. According to the Appellate Court, sufficient minimum contact with Illinois was shown by Englebert's awareness that its tires "would be installed on Opels destined for export to the United States and that some of the Opels equipped with its tires would be sold in Illinois" (App. 27).

In the Illinois Supreme Court appellee again contended that Englebert Belgique had committed a tort in Illinois and had transacted business there. A frequently cited decision on the permissible reach of a long arm statute is the Illinois Supreme Court opinion in *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *Gray* has been consistently read, in Illinois and elsewhere, to hold that injury is an inseparable part of the tortious act and that the commission of the tort occurs at the place where the injury occurs; accordingly, a manufacturer of a product commits a tort at the place where its product causes injury.

Consistent with its own clear precedent, the Illinois Supreme Court refused to hold, as the Appellate Court had, that this injury in Colorado constituted the commission of a tort in Illinois (App. 11). In its initial opinion, however, the Illinois Supreme Court accepted appellee's alternative contention and held that the distribution in Illinois of its products constituted the transaction of business in Illinois

(App. 8-9). Following Englebert Belgique's petition for rehearing, the modified opinion of the Illinois Supreme Court avoided any reference to the specific categories of conduct enumerated in the Illinois Long Arm Statute, including its earlier position that Englebert Belgique had transacted business in Illinois (App. 7-8). Instead, that Court simply asserted that the presence of the tires meant that Englebert Belgique had "purposefully invoked the benefits and protections of the law of Illinois" (App. 10-11).

The Illinois Supreme Court acknowledged that there are "diametrically opposed and irreconcilable views on the question whether a manufacturer whose product has been distributed in a State by a third party" could be subjected to long arm service of process (App. 9). And, that Court also acknowledged that recent holdings of the Court of Appeals for the Eighth Circuit *en banc* and the Supreme Court of Michigan are contrary to its instant holding that Englebert Belgique could be subjected to the jurisdiction.* Instead, the Illinois Court purported to follow a decision by the California Supreme Court, even though the tort in that case involved an *injury in California.***

(E) SUBSTANTIALITY OF THE FEDERAL QUESTION

As construed by Illinois' highest court, its long arm statute now enables Illinois to exercise jurisdiction over a non-resident whose sole contact with that state is the pres-

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* Hutson v. Fehr Brothers, Inc., 584 F.2d 833 (8th Cir. 1978), *cert. den.*, ... U.S. ....., 99 S.Ct. 573 (1978); Hapner v. Rolf Brauchli, Inc., 400 Mich. 160, 273 N.W.2d 822 (1978).

** Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57 (1969).

ence there of a product which the non-resident had manufactured and sold outside that state. Nothing else need be shown.

This far reaching extension of long arm jurisdiction and the implications thereof raise serious questions under the fourteenth amendment of the Constitution. The substantiality of those questions are established by the following:

> —Two cases are now before this Court wherein it will review the permissible scope of jurisdiction over a non-resident seller and over a tort claim occurring outside of the forum state;
>
> —The clear avoidance by the Illinois court of the due process requirements previously enunciated by this Court;
>
> —The irreconcilable conflict between the instant construction of the due process clause by the Illinois court and the construction of that clause by other state and federal courts.

(i) Pending Cases Involving the Same Constitutional Question

Probable jurisdiction has been noted in *Rush* v. *Savchuk*, 245 N.W.2d 624; 272 N.W.2d 888 (Minn.), *prob. juris. noted*, ... U.S. ....., 99 S.Ct. 1211 (1979) (No. 78-952), an appeal from the Supreme Court of Minnesota. *Rush* involves two residents of Indiana who were involved in an automobile accident in that state, after which the passenger moved to Minnesota where he commenced an action against the Indiana driver and his insurance company. The now challeged jurisdiction was obtained by garnishing, pursuant to the provisions of a Minnesota statute, the insurance policy.

A petition for a writ of certiorari to the Supreme Court of Oklahoma was granted in *World-Wide Volkswagon Corp.* v. *Woodson,* 585 P.2d 351 (Okl. 1978), *cert. granted,* ..... U.S. ....., 99 S.Ct. 1212 (1979) (No. 78-1078). *World-Wide* involves a tort action arising out of an accident which occurred in Oklahoma, the forum state. Those plaintiffs were operating an automobile which had been purchased in New York, and they relied on the Oklahoma long arm statute to obtain jurisdiction over the New York automobile dealer who had sold the automobile.

The same substantial federal question, which compelled this Court to hear the above two matters, is involved here. This case, however, involves significant additional facts, namely a tort which occurred outside of the forum state and a suit against a manufacturer. The instant case brings a constitutional issue before this Court which has as great an impact on the judicial system of this Nation as is presented by the two pending matters.

Moreover, the pendency of the above two matters requires the granting of the instant appeal since the forthcoming decisions on those matters will unquestionably clarify the question as to whether Illinois properly asserted jurisdiction over Englebert Belgique. Should this Court reverse or remand either of the above two matters and not allow the instant appeal, Englebert Belgique would be unjustly and irreparably prejudiced since the Illinois judgment would be final, even though it was contrary to the standards set forth by this Court.

(ii) Illinois Ignored the Due Process Requirements

Four decisions of this Court—*International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), *Hanson* v. *Denckla,* 357 U.S. 235 (1957), *Shaffer* v. *Heitner,* 433 U.S.

186 (1977), and *Kulko* v. *Superior Court,* 436 U.S. 84 (1978) —have set forth the standards which must be satisfied before a state may impose its jurisdiction over a non-resident defendant. Repeatedly, this Court has stated that the proponent of asserted jurisdiction over a non-resident must establish that the activity or contact by the non-resident with the forum state constituted a *purposeful availing of the benefits and protections of that state.* The present record does not allow such a finding.

Initially, the Illinois court assumed that Englebert Belgique purposefully invoked the benefits and protections of "those states along the stream of commerce", namely, *every state* where some other party decided to market the automobile or where a consumer decided to use it (App. 8). In its modified opinion the Illinois court narrowed that assumption, and by reliance on the number of tires which third parties had brought into Illinois it merely assumed that Englebert Belgique had purposefully invoked the benefits and protections of Illinois (App. 10).

Those benefits and protections of Illinois are not identified in, nor were they discernible from, either opinion by the Illinois court. Moreover, a comparison of the conduct involved here with the conduct which this Court has already concluded *does not* amount to a purposeful invoking of the benefits and protections of the forum state, establishes the clear error in the holding of the Illinois court.

International Shoe

In *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), even though the non-resident's products were delivered into that state by the non-resident (not merely present as involved here), neither the State of Washington nor this Court suggested that the mere presence of

those products was a sufficient jurisdictional contact. Rather, that defendant's *activities* in Washington—its employment of resident salesmen—justified Washington's jurisdiction over International.

Clearly, *International Shoe* holds that the presence of a product, without some other activity in the forum, is not sufficient contact. Moreover, the requisite activity by the non-resident "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* at 316. Accordingly, the instant distribution in Illinois by third parties is not "activity" by Englebert Belgique which could justify Illinois' assertion of jurisdiction over it.

Hanson v. Denckla

In *Hanson* v. *Denckla,* 357 U.S. 235 (1958), the settlor and life beneficiary of that trust was a Florida resident who had retained control over the trust. The non-resident defendant, a corporate trustee, was in privity with the settlor and maintained regular business relations by communicating with the settlor in Florida; and the power of appointment out of which the controversy arose was executed in Florida.

Florida could not obtain jurisdiction over the non-resident trustee because that "record discloses no instance in which the trustee performed any acts in Florida . . ." (*id.* at 252) and because "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state". *Id.* at 253.

Hanson also repeated the principle that "the unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of con-

tact with the forum State". Id. at 253. Although Illinois purported to find the requisite activity in the so-called "distribution in Illinois of its products" (App. 8-9), that court simultaneously acknowledged that the automobile was assembled and shipped to the United States "for distribution by General Motors" (App. 2). Neither its distribution in Illinois nor its presence there involved Englebert Belgique.

If the conduct or activity of the non-resident corporate trustee in *Hanson* did not amount to a purposeful invoking of the benefits and protections of Florida, then Englebert Belgique has most certainly not invoked the benefits and protections of Illinois.

Shaffer v. Heitner

Shaffer v. *Heitner,* 433 U.S. 186 (1977), involved an action in a Delaware court against non-resident officers of a Delaware corporation who were stockholders of that corporation. Plaintiff sought to obtain jurisdiction by sequestering the officers' stock which, under Delaware law, had its situs in that state.

That plaintiff could not "identify any act related to his cause of action as having taken place in Delaware" (*id.* at 213) since the non-residents' only contact with Delaware was the presence there of their stock. In holding the presence of that property was an insufficient contact this Court ruled:

> "Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, *the presence of the property alone would not support* the State's jurisdiction. If those *other ties did not exist,* cases over which the State is now thought to have jurisdiction could not be brought in the forum." *Id.* at 209 (emphasis supplied).

Moreover, the presence of such property:

> "*does not demonstrate* that the appellants (*i.e.*, the non-resident defendants) have 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum State' (citing *Hanson* v. *Denckla*) in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware." *Id.* at 216 (emphasis supplied).

Property, as involved in *Shaffer,* is significantly different than a product which was previously manufactured by a non-resident and as to which the non-resident long ago gave up any claim of ownership or control. Property connotes title; it is personalty or realty which is then *owned* by the non-resident. If the presence in a forum state of property is not a sufficient "minimum contact" and does not establish a purposeful invoking of the benefits and protections of that state, then the presence in Illinois of a product manufactured by Englebert Belgique is clearly not a sufficient contact.

Kulko v. Superior Court

Kulko v. *Superior Court,* 436 U.S. 84 (1978), involved jurisdiction as to a non-resident father in a child support dispute in a California court. Although those facts are distinguishable from the present situation, *Kulko* restated principles that are applicable here.

First, this Court reaffirmed its earlier statement that "unilateral activity" by persons other than the non-resident defendant does not constitute the requisite contact with the forum. *Id.* at 93-94. Accordingly, the distribution activity by other persons still does not constitute contact by Englebert Belgique with Illinois.

Secondly, the *presence* of his child by *consent* of that non-resident did not have an effect on California to warrant the exercise of jurisdiction. Similarly, any effect on Illinois, from the presence there of the automobile, tire or appellee, is not a sufficient contact to support jurisdiction over Englebert Belgique.

Clearly, the Illinois Supreme Court did not follow the standards and criterion set forth in the above four decisions.

(iii) The Illinois Court Has Construed the Due Process Clause Differently Than Other State and Federal Courts

The opinion of the Illinois Supreme Court itself establishes the substantiality of the federal question here involved by its acknowledgment that there are *dramatically opposed and irreconcilable views* on the instant jurisdictional question (App. 9).

Significantly, the Illinois court cited no decision approving an exercise of jurisdiction as to an out of state tort where the non-resident's only contact with the forum was the presence of its product. The California decision, on which that court purportedly relied (App. 9), involved an *injury in California* and a non-resident who received orders "directly from" a California plant and shipped "directly to" that plant; moreover, the California court recognized that "mere presence of product in a state (is) not enough to sustain jurisdiction."*

Each of the fifty states has a statute of general applicability which seeks to assert jurisdiction over a non-resident

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* Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 61, 64 (1969).

for acts committed within that state. A review of the decisions construing those statutes discloses recognized principles, as to the due process restrictions on such legislation, which are contrary to the position taken by the Illinois court.

Courts throughout the nation have consistently held that, for the commission of a tort to be within the state, the *injury* must have been sustained *within that state.**

No decision has been found by appellant, and none has heretofore been cited by appellee, wherein the presence of a product in the forum state was deemed to be the transaction of business within that state. Those courts which have addressed that question have uniformly held that the *mere presence* of a non-resident's product within the state is *not sufficient* contact to establish jurisdiction. For example, in *Fisons Ltd.* v. *United States,* 458 F.2d 1241 (7th Cir. 1972), the Illinois Long Arm Statute was used to obtain jurisdiction over English manufacturers. Although those non-residents had direct contacts with Illinois, which there supported jurisdiction, such would not have been the holding if the English manufacturers were "*simply manufacturers whose products are resold in the forum*". *Id.* at 1250-51. (emphasis supplied.)**

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* Jenrette v. Seaboard Coastline R. R., 308 F. Supp. 642 (D.S.C. 1969); Canadian Bronze Co., Ltd. v. Kenzler, 64 F. R. D. 79 (E.D. Wisc. 1974); Busch v. Service Plastics, Inc., 261 F. Supp. 136, 140 (N.D. Ohio 1966); Rush v. Matson Navigation Co., 221 So. 2d 265, 266 (La. App. 1969); Crimi v. Eliot Bros. Trucking Co., 279 F. Supp. 555 (S.D.N.Y. 1968); Friedr. Zoellner Corp. v. Tex Metals Co., 278 F. Supp. 52, 56 (S.D.N.Y.), *aff'd*, 396 F.2d 300 (2nd Cir. 1967).

** See also: Bass v. Harbor Light Marina, Inc., 372 F. Supp. 786, 792 (D.S.C. 1974); Phillip v. Knapp-Monarch Co., 245 S.C. 383, 140 S.E.2d 786 (1965); Lycoming Div. of Avco Corp. v. Superior Court, 22 Ariz. App. 150, 524 P.2d 1323, 1326 (1974).

The "opposed and irreconcilable view", which was acknowledged by the Illinois Court, is clearly seen in the two cases cited by that court (App. 9).

In *Hutson* v. *Fehr Bros.,* 584 F.2d 833 (8th Cir.), *cert. den.,* ..... U.S. ....., 99 S.Ct. 573 (1978), the *en banc* Court of Appeals for the Eighth Circuit held that an Italian distributor, who purchased a product from a manufacturer in Yugoslavia and then sold it to another distributor who ultimately distributed it in this country, was *not subject* to jurisdiction in an action by an Arkansas worker who was injured there by the product. That Italian distributor (like Englebert Belgique here) had never marketed in the United States. Most significantly, the decision to sell into Arkansas had been made by the subsequent distributor (like General Motors here), who controlled the selection of customers and made all marketing decisions. On such facts, the Italian distributor *had not invoked* the benefits and protections of Arkansas.

Similarly, in *Hapner* v. *Rolf Brauchli,* 404 Mich. 160, 273 N.W.2d 822 (1978), a Swiss manufacturer whose product injured the plaintiff in Michigan was not subject to jurisdiction merely because its product had been brought into Michigan. That fact did not support a finding that the manufacturer had purposefully availed itself of the benefits and protections of Michigan.

All of the "purposeful" acts to market the instant automobile in Illinois were made by persons other than Englebert Belgique, since it had no involvement in any marketing decision after it sold the tire. There was nothing to suggest that Englebert Belgique aimed or directed any marketing effort at Illinois. It had no contract or distributor relation with anyone in Illinois.

At best, it is merely possible, and thereby foreseeable, that any product, wherever and by whomever made, might be imported into the United States and then into any state. Foreseeability is, however, a substantially lesser activity than the constitutional requirement that the non-resident *purposefully* avail itself of the benefits and protections of the forum state. Foreseeability that a product may be present in the forum state must, at a minimum, be coupled with some *affiliating circumstances* before it is reasonable or fair for a state to subject a non-resident to its jurisdiction. Those affiliating circumstances are present only when a non-resident purposefully sought to reach or exploit a market in the forum state by some advertisements or marketing activities.

If the long arm jurisdiction of each state is co-extensive with a litigant's simple allegation—that the product's foreseeable stream of commerce means that it might be present or used in the forum (on which theory the Illinois court has totally relied)—then *International Shoe* did herald the demise of any constitutional restriction on the scope of extra-territorial jurisdiction.

A resident of this nation who elects to travel outside of the state of his residency accepts the risk that an injury may occur while he is present in another state. Such a resident must leave behind the laws and protections of his own state and must accept the laws of each state into which he goes. These changing legal rights are "a consequence of territorial limitations on the power of the respective states". *Hanson* v. *Denckla,* 357 U.S. 235, 251 (1957).

Indeed, appellee's pending lawsuit in the United States District Court for the District of Colorado recognizes this very fact of living in a nation of separate states. In addition, the pendency of that companion lawsuit in Colorado

adds a factual element upon which this Court has commented.* Whether Illinois might have had an interest in providing a forum for a resident when no other forum was available is a question that need not be answered. Appellee not only had other available forums but has, in fact, availed himself of one such forum.

At this time of burgeoning product liability litigation, the jurisdictional significance from the mere presence in a state of a product which was manufactured and sold outside of the state is an issue that impacts every trial court in the nation. For this reason alone, this Court should find probable jurisdiction of this appeal.

CONCLUSION

Appellant, Uniroyal Englebert Belgique, S.A., respectfully requests this Court to reverse the judgment of the Supreme Court of the State of Illinois in all respects in which that judgment purports to exercise *in personam* jurisdiction over Englebert Belgique.

Respectfully submitted,

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* Shaffer v. Heitner, 433 U.S. 186, 211 n. 37 (1977).

APPENDIX

APPENDIX

(cite as 75 Ill. 2d 393)

SUPREME COURT OF ILLINOIS

No. 50358

John Darrill Connelly,

Appellee

vs.

Uniroyal, Inc., and Uniroyal Englebert Belgique, S. A., a Belgian corporation,

Appellants

Appeal from Appellate Court First District

[*Initial opinion filed on January 26, 1979; modified opinion filed on March 30, 1979 upon denial of petition for rehearing*]

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, John Darrill Connelly, brought this action in the circuit court of Cook County against defendants, Uniroyal Englebert Belgique, S.A. (hereafter Engelbert), and Uniroyal, Inc. (hereafter Uniroyal), and other defendants not involved in this appeal, seeking to recover damages for personal injuries. The circuit court denied both Englebert's motion to quash the service of summons and Uniroyal's motion for summary judgment and in its orders included the findings requisite to an application for leave to appeal. (S. Ct. Rule 308 (58 Ill. 2d R. 308).) The appel-

late court allowed defendants' application for leave to appeal, affirmed as to Englebert, and reversed as to Uniroyal (55 Ill. App. 3d 530), and we have allowed defendant Englebert's petition for leave to appeal.

It is alleged in plaintiff's complaint, as amended, that in November 1970 he suffered personal injuries when a tire manufactured by Englebert and bearing Uniroyal's trademark failed while his 1969 Opel Kadett was being operated on a highway in Colorado. Plaintiff's father had purchased the automobile in September 1969 from a Buick dealer in Evanston. The tire bore the name "Uniroyal" and the legend "made in Belgium" and admittedly was manufactured by defendant Englebert, sold in Belgium to General Motors, and subsequently installed on the Opel when it was assembled at a General Motors plant in Belgium. The automobile was shipped to the United States for distribution by General Motors. It appears from answers to interrogatories that between the years 1968 and 1971 in excess of 4,000 Opels imported into the United States from Antwerp were delivered to dealers in Illinois; that in each of those years between 600 and 1,320 of the Opels delivered to Illinois dealers were equipped with tires manufactured by Englebert, and that the estimated number of Englebert tires mounted on Opels delivered in Illinois within those years ranged from 3,235 to 6,630.

Defendant Englebert alleged in its motion to quash the service of process that its principal place of business is in Belgium; that it is not registered to do business and has never had an agent, employee, representative or salesman in Illinois; that it has never possessed or controlled any real property or maintained any office or telephone listing in Illinois; that it has never sold or shipped any products into Illinois, either directly or indirectly; and that it has never advertised in Illinois. Defendant avers that the

summons is "a nullity and [has] no legal effect in that Englebert Belgique has not done any of the acts enumerated in the Illinois Long Arm statute (ch. 110, sec. 17, Illinois Revised Stat.), nor has it otherwise submitted itself to the jurisdiction of the courts of this state"; and that "there is a total lack of contact between Englebert Belgique and the State of Illinois so that an assertion of jurisdiction by this court over this defendant would be contrary to substantial justice and would violate the rights of this defendant under the Constitutions of the United States of America and of the State of Illinois."

The relevant statutes in pertinent part provide:

"Sec. 13.3 Service on private corporations.

A private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of said corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law. A private corporation may also be notified by publication and mail in like manner and with like effect as individuals." Ill. Rev. Stat. 1971, ch. 110, par. 13.3.

"Sec. 16. Personal service outside State.

(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication." Ill. Rev. Stat. 1971, ch. 110, par. 16(1).

"Sec. 17. Act submitting to jurisdiction—Process.

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal

representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

* * *

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law." Ill. Rev. Stat. 1971, ch. 110, par. 17.

In affirming the order denying Englebert's motion to quash, following a review of the authorities the appellate court said:

"Based on these authorities, we conclude that the phrase 'commission of a tortious act' as employed in the long-arm statute applies not only to an injury which occurs in Illinois, but also to all elements and conduct which significantly relate to or have significant causal connection with the injury suffered." 55 Ill. App. 3d 530, 535.

In *Braband* v. *Beech Aircraft Corp.* (1978), 72 Ill. 2d 548, we considered the question whether Beech Aircraft was amenable to process in this State in an action for the

wrongful deaths of two residents of Illinois who were killed when an airplane manufactured by Beech crashed in Canada. We noted that in *Shaffer* v. *Heitner* (1977), 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569, the Supreme Court had held "that the standards elucidated in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, continued to be the test of a State's jurisdiction over a foreign corporation. The standards prescribed in *International Shoe Co.* are that 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' (326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158.)" 72 Ill. 2d 548, 553-54.

We quoted from *Shaffer* v. *Heitner* the Supreme Court's comment that:

"[T]he inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present' but on whether there have been

'such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.' [326 U.S. 310, 317, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158.]

Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

'Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due

process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.' [326 U.S. 310, 319, 90 L. Ed. 95, 104, 66 S. Ct. 154, 160.]'' 433 U.S. 186, 203-04, 53 L. Ed. 2d 683, 697, 97 S. Ct. 2569, 2580.

We reviewed this court's earlier opinion in *Nelson* v. *Miller* (1957), 11 Ill. 2d 378, wherein the court said:

> ''The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy. The limits on the exercise of jurisdiction are not 'mechanical or quantitative' (*International Shoe Co.* v. *Washington,* 326 U.S. 310, 319 (1945),) but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances, and must give to the defendant adequate notice of the claim against him, and an adequate and realistic opportunity to appear and be heard in his defense.'' (11 Ill. 2d 378, 384.)

We agreed with the statement in *Nelson* that ''Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.'' 11 Ill. 2d 378, 389.

In *Gray* v. *American Radiator & Standard Sanitary Corp.* (1961), 22 Ill. 2d 432, this court said:

> ''As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing

business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

> The principles of due process relevant to the issue in this case support jurisdiction in the court where both parties can most conveniently settle their dispute.'' 22 Ill. 2d 432, 442-43.

[*Following paragraph appeared in initial opinion but was deleted from modified opinion*]

Defendant Englebert's tires, introduced into the stream of commerce in obvious contemplation of their ultimate sale or use in other nations or States, came into Illinois in substantial numbers. Given the nature and quality of its activities, it is not unreasonable to conclude that Englebert, though a nonresident, has purposefully invoked the benefits and protections of the laws of those States along the stream of commerce where its products are in fact marketed or used. In our opinion the distribution in Illinois of its products to the extent shown here constitutes the ''transac-

tion of any business'' within the contemplation of section 17(1)(a) of the Civil Practice Act. Requiring Englebert to defend this action does not offend ''traditional notions of fair play and substantial justice,'' and we hold that as required by *International Shoe* and *Shaffer* there were present ''such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.'' (326 U.S. 310, 317, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158; 433 U.S. 186, 203-04, 53 L. Ed. 2d 683, 697, 97 S. Ct. 2569, 2580.) The judgment of the appellate court affirming the order of the circuit court denying Englebert's motion to quash the service of summons is affirmed. We do not reach the question whether defendant committed a tortious act in Illinois within the contemplation of section 17(1)(b) of the Civil Practice Act and express no opinion concerning the correctness of the appellate court's holding on that issue.

[*Following three paragraphs were included in modified opinion in lieu of the paragraph above*]

In support of its contention that to assert jurisdiction in this case would be violative of due process, Englebert argues that under *Hanson* v. *Denckla* (1958), 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228, the requirements of due process are not satisfied unless a corporation has exercised the privilege of conducting activities within the State and thereby enjoyed the benefits and protections of the laws of that State and that there has been no action on its part by which it purposely availed itself of the privilege of conducting activities within Illinois and thereby invoked the benefits and protections of its laws.

The ''quality and nature of the activity'' in which a foreign corporation must engage within a State in order to be subject to the jurisdiction of its courts has been the

subject of much litigation. (See Annots., 19 A.L.R.3d 13 (1968), 24 A.L.R.3d 532 (1969).) The diametrically opposed and irreconcilable views on the question whether a manufacturer whose product has been distributed in a State by a third party is insulated from *in personam* jurisdiction under the due process clause of the fourteenth amendment in a product liability case because the sale and distribution of the product into the forum State was through an intermediary, rather than by the manufacturer, are well demonstrated by the majority and dissenting opinions in the cases of *Hudson* [*sic*] v. *Fehr Brothers, Inc.* (8th Cir. 1978), 584 F.2d 833, and *Hapner* v. *Rolf Brauchli, Inc.* (1978), ... Mich. ....., 273 N.W.2d 822. We find persuasive the opinion of the Supreme Court of California in *Buckeye Boiler Co.* v. *Superior Court* (1969), 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113. In *Buckeye* the court held that engaging in economic activity within the State ''as a matter of commercial actuality'' (71 Cal. 2d 893, 902, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120) met the requirement of *Hanson* v. *Denckla* that there be purposeful activity within the State (357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240). The court said:

> ''A manufacturer engages in economic activity within a state as a matter of 'commercial actuality' whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result. (See, e.g., *Gray* v. *American Radiator & Standard Sanitary Corp.* [22 Ill. 2d 432, 442]; *Metal-Matic, Inc.* v. *District Court,* 82 Nev. 263 [415 P.2d 617]; *DiMeo* v. *Minster Machine Co.,* 225 F. Supp. 569 [mere presence of product in state not enough to sustain jurisdiction]; Comment, *supra,* 63 Mich. L. Rev. 1028, 1033-1034; but see *Gill* v. *Surgitool, Inc.,* 256 Cal. App. 2d 583, 588 [64 Cal. Rptr. 207].)

A manufacturer's economic relationship with a state does not necessarily differ in substance, nor should its amenability to jurisdiction necessarily differ, depending upon whether it deals directly or indirectly with residents of the state. 'With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from [their] laws is an indirect one, however, does not make [those laws] any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with [such states] to justify a requirement that he defend [there].' (*Gray* v. *American Radiator & Standard Sanitary Corp.* [22 Ill. 2d 432, 442].)

A manufacturer whose products pass through the hands of one or more middlemen before reaching their ultimate users cannot disclaim responsibility for the total distribution pattern of the products. If the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state.'' 71 Cal. 2d 893, 902, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120.

Defendant Englebert's tires, introduced into the stream of commerce in obvious contemplation of their ultimate sale or use in other nations or States, came into Illinois on a regular basis and in substantial numbers, and we hold that its activities rendered it amenable to process under sections 13.3 and 16 of the Civil Practice Act. Given the nature and quality of its activities, we hold further that Englebert has purposefully invoked the benefits and protections of the law of Illinois, that as required by *International Shoe* and *Shaffer* there were present ''such contacts of

the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there'' (326 U.S. 310, 317, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158; 433 U.S. 186, 203, 53 L. Ed. 2d 683, 697, 97 S. Ct. 2569, 2580), and that requiring it to defend this action does not offend ''traditional notions of fair play and substantial justice'' (326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158). The judgment of the appellate court affirming the order of the circuit court denying Englebert's motion to quash the service of summons is affirmed. We do not reach the question whether defendant committed a tortious act in Illinois within the contemplation of section 17(1)(b) of the Civil Practice Act and express no opinion concerning the correctness of the appellate court's holding on that issue.

[*Following paragraphs appeared in initial and modified opinions*]

We consider next whether the appellate court erred in reversing the order of the circuit court denying Uniroyal's motion for summary judgment. Plaintiff contends that the ''same principles which justify liability for wholesalers and retailers (who are components of the distributive chain 'downstream' from the manufacturer) compel liability on the part of the entity which bears overall responsibility for the entire enterprise which produces and markets the product—the 'upstream' parent under whose aegis the entire enterprise functions.'' Plaintiff bases this conclusion on the following assertions: ''(1) Uniroyal sits at the pinnacle of the enterprise which produced the tire in question; (2) Uniroyal authorized the use of its trademark and trade name on the product in question, and thereby lent its good will and at least the appearance of responsibility for the product; (3) As one component of the Uniroyal enterprise,

UEB [Englebert] and its products directly or indirectly affect the corporate financial health of the Uniroyal enterprise, and the profits from the sales of this and other UEB [Englebert] products ultimately enure to the benefit of Uniroyal [;] [and] (4) Uniroyal had the right to exercise control over the manufacturing and marketing of UEB [Englebert] products, including the tire in question."

It appears from Uniroyal's motion for summary judgment, the affidavits, and answers to interrogatories that at the time the tire in question was manufactured a wholly owned subsidiary of Uniroyal owned approximately 95%, and presently owns approximately 96%, of the outstanding shares of Englebert; that in 1966, Englebert Societe Anonyme became known as Uniroyal Englebert Belgique, S.A.; that in 1964 Uniroyal granted Englebert the nonexclusive license to use its registered trade name, "UNIROYAL"; and that in a contract, dated October 1, 1962, between Uniroyal [formerly known as United Rubber Co.] and Englebert, Uniroyal was to make available to Englebert detailed information as to the methods, processes and formulas used in the manufacture of tires and tubes and other products manufactured by Uniroyal. Also included was a provision whereby Uniroyal would supply technical services and instruction to Englebert, including recommendations and assistance in purchasing equipment, processes to improve operations, supplying of specifications, including testing procedure, and information concerning the construction of the products covered by the agreement, including "patterns and prints where necessary to describe constructions." Englebert was free to send representatives to visit Uniroyal's plant and investigate manufacturing methods and processes and formulas used in those plants. The agreement also provided for quarterly payments to Uniroyal and that Englebert "in its advertising * * * may publicize * * * the facts that in its manufacturing practices it practices and employs the manufacturing and technical methods used in the United States by [Uniroyal] and that Englebert adopted these methods after investigation and study of manufacturing and technical methods followed by manufacturers in the most promising and progressive." Englebert was required to permit Uniroyal's representatives "to have knowledge at all times of the goods and manufacturing operations * * * associated with its business identified with the trademark and logo," and under certain conditions preference was to be accorded Uniroyal in Englebert's purchases of materials produced by Uniroyal.

It appears further that Englebert maintained its own books and accounts separate and distinct from Uniroyal, had its own banking sources and line of credit, and did not share common manufacturing facilities, offices, addresses, telephone numbers or employees with Uniroyal; that there were no employees of Uniroyal at Englebert's plant in Belgium and Uniroyal had no control or direction over the production at that plant; that Engelbert's liability insurance policy was separate and distinct from any insurance maintained by Uniroyal; and that there had never been any joint meetings of the separate boards of the directors of Uniroyal and Englebert. Uniroyal also stated that it has never advertised for sale any product produced by Englebert and was never in possession of the tire here involved; that all records which may exist relating to the tire have been in the exclusive possession of Englebert; and that Uniroyal has made no warranty of any kind to any person with respect to this tire.

The appellate court held that despite Uniroyal's substantial ownership of Englebert's stock the two corporations had always operated as separate entities and there was no basis to impose vicarious liability on Uniroyal. (55

Ill. App. 3d 530, 540.) We agree. We find nothing in the pleadings, depositions or answers to interrogatories which persuades us that the relationship between these two corporations arising out of stock ownership or representation on the board of directors provided a sufficient basis for the imposition of vicarious liability on Uniroyal.

We consider next the question whether, as contended by plaintiff, the doctrine of strict liability approved in *Suvada* v. *White Motor Co.* (1965), 32 Ill. 2d 612, is applicable to Uniroyal on the basis that the allegedly defective tire bore its trademark.

In *Suvada* the court said:

> "In addition to the manufacturer, liability in tort for a defective product extends to a seller, (*Lindroth* v. *Walgreen Co.* 407 Ill. 121,) a contractor, (*Paul Harris Furniture Co.* v. *Morse,* 10 Ill. 2d 28,) and a supplier, (*Watts* v. *Bacon & Van Buskirk,* 18 Ill. 2d 226,) one who holds himself out to be the manufacturer, (*Lill* v. *Murphy Door Bed Co.* 290 Ill. App. 328,) the assembler of parts (*Rotche* v. *Buick Motor Co.* 358 Ill. 507) and the manufacturer of a component part. (*Gray* v. *American Radiator and Standard Sanitary Corp.* 22 Ill. 2d 432.) Lack of privity of contract not being a defense in a tort action against the manufacturer, it is not a defense in an action against any of these parties." (32 Ill. 2d 612, 617.)

In *Dunham* v. *Vaughan & Bushnell Mfg. Co.* (1969), 42 Ill. 2d 339, the court held that strict liability applied to the wholesaler defendant "despite the fact that the box in which this hammer was packaged passed unopened through Belknap's [the wholesaler's] warehouse." (42 Ill. 2d 339, 344.) Our decision in *Crowe* v. *Public Building Com.* (Dec. 4, 1978), Docket No. 50258, confirms that the doctrine of strict liability applies not only to the lessor, but also to the former lessor of a defective product.

In support of his argument plaintiff cites Restatement (Second) of Torts, section 400 (1965), which provides:

> "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."

Cases cited by plaintiff in which the owner of a trademark has been held liable for a defective product manufactured by another are *Wojciuk* v. *United States Rubber Co.* (1961), 13 Wis. 2d 173, 108 N.W.2d 149, *Forry* v. *Gulf Oil Corp.* (1968), 428 Pa. 334, 237 A.2d 593, *Dudley Sports Co.* v. *Schmitt* (1972), 151 Ind. App. 217, 279 N.E.2d 266, and *Carter* v. *Joseph Bancroft & Sons Co.* (E.D. Pa. 1973), 360 F. Supp. 1103, and cases collected at 51 A.L.R.3d 1344 (1973).

Uniroyal responds that section 400 of the Restatement is not here applicable because Uniroyal was not a seller of the tire, and that in all cases cited by plaintiff the owner of the trademark held liable had in some manner constituted a link in the chain of the product's distribution. From this, defendant argues, that absent some participation in the chain of distribution defendant cannot be held liable.

Although it appears that in the cases cited by plaintiff the defendants participated in the distribution of the product, we do not consider that such participation is an essential element in order that the doctrine of strict liability apply. Nor do we agree that in *Forry* v. *Gulf Oil Corp.* (1968), 428 Pa. 334, 237 A.2d 593, and *Carter* v. *Joseph Bancroft & Sons Co.* (E.D. Pa. 1973), 360 F. Supp. 1103, such participation was found to be an essential element. The seller in *Forry* was Gulf Tire and Supply Co., and a careful reading of the opinion shows that the court drew no distinction between that corporation and Gulf Oil Corporation, whose trademark the tire in that case bore. In *Carter* it does not appear that the liability of defendants,

Indiana Head, Inc., and Joseph Bancroft & Sons Co., arose from actions other than licensing the use of the trademark "Ban-Lon."

In *Liberty Mutual Insurance Co.* v. *Williams Machine & Tool Co.* (1975), 62 Ill. 2d 77, 82, the court said, "The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the 'negligence' of the manufacturer." 62 Ill. 2d 77, 82.

A licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce (2 J. Dooley, Modern Tort Law, sec. 32.67, at 340 (1977)) presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors. The societal purposes underlying *Suvada* mandate that the doctrine be applicable to one who, for a consideration, authorizes the use of his trademark, particularly when, as here, the product bears no indication that it was manufactured by any other entity. The fact that the defendant may not have been a link in the chain of distribution is wholly irrelevant, for as the court, referring to a seller, contractor or supplier, said in *Suvada,* "Lack of privity of contract not being a defense in a tort action against the manufacturer, it is not a defense in an action against any of these parties." 32 Ill. 2d 612, 617.

In *Econo Lease, Inc.* v. *Noffsinger* (1976), 63 Ill. 2d 390, 393, the court said:

> "A motion for summary judgment will be granted if the pleadings, depositions, admissions and affidavits on file reveal that there is no genuine issue as to any material fact and that the movant is entitled to a judgment or decree as a matter of law. (Ill. Rev. Stat. 1975, ch. 110, par. 57(3); *Carruthers* v. *B.C. Christopher & Co.,* 57 Ill. 2d 376.) A reviewing court must reverse an order granting summary judgment if it is determined that a material question of fact does exist."

Because we have held that defendant Uniroyal's participation in the chain of distribution is not an essential element of strict liability, we are unable to say that there are no material questions of fact presented by this record.

For the reasons stated, insofar as it reversed the order of the circuit court denying defendant Uniroyal's motion for summary judgment, the judgment of the appellate court is reversed. The orders of the circuit court are affirmed, and the cause is remanded to that court for further proceedings consistent with this opinion.

Appellate court affirmed in part and reversed in part; circuit court affirmed; cause remanded.

(Cite as 55 Ill. App. 3d 530, 370 N.E.2d 1189)

JOHN DARRILL CONNELLY,

Plaintiff-Appellee,

vs.

UNIROYAL, INC., a corporation and UNIROYAL ENGLEBERT BELGIQUE, S.A., a Belgian corporation,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County.
Honorable Daniel P. Coman, Presiding.

Opinion filed December 7, 1977.

MR. PRESIDING JUSTICE SIMON delivered the opinion of the court:

This is an interlocutory appeal with the permission of this court pursuant to Illinois Supreme Court Rule 308 (Ill. Rev. Stat. 1975, ch. 110A, par. 308) in which each defendant has raised an independent question.

We consider first the issue raised by defendant Uniroyal Englebert Belgique, S.A. (Englebert), a Belgian corporation, neither registered nor found in Illinois. Englebert was served in Belgium with summons issued by the Circuit Court of Cook County, and moved to quash that service, claiming it had done nothing to submit itself to the jurisdiction of our courts. The Circuit Court denied the motion to quash, and Englebert's appeal requires us to grapple

with the concept of the "commission of a tortious act within" Illinois, which brings a non-resident into our courts under the authority of the state long-arm statute. (Ill. Rev. Stat. 1973, ch. 110, par. 17(1)(b)). In view of the conclusion we reach, it is unnecessary to consider whether Englebert is subject to the jurisdiction of Illinois courts because it is doing business in Illinois (see *St. Louis-San Francisco Railway Co.* v. *Gitchoff* (Docket No. 48947, Oct. Term 1977), ... Ill. 2d ....., ... N.E.2d .....) or because there was any transaction of business in Illinois by Englebert. See Ill. Rev. Stat. 1973, ch. 110, par. 17(1)(a).

Englebert manufactures and sells tires, including tires sold to General Motors in Belgium. The latter corporation manufactures or assembles its Opel automobiles in a General Motors plant in Belgium, and ships them to the United States.

Plaintiff's father purchased an Opel with Englebert tires from an Illinois Buick dealer on September 13, 1969. The automobile was garaged, maintained and principally used in Illinois. Plaintiff was injured when a tire on the Opel failed while the auto was being operated in Colorado.

Plaintiff as well as his father are residents of Illinois. Plaintiff has verified an affidavit stating that the majority of the witnesses who will be called in the action, except for those employed by defendants, are located in Illinois or could more conveniently be brought here than to Colorado or elsewhere. This is not contested by Englebert. Englebert contends Illinois has no jurisdiction because the cause of action did not arise from a commission of a tortious act by Englebert in Illinois.

Englebert's appeal raises two separate inquiries: First, can the language, "the commission of a tortious act within this State," as used in the long-arm statute be construed to

include the acts of Englebert; and second, does the record show Englebert had sufficient minimum contacts with Illinois to subject it to jurisdiction in Illinois without violating due process standards.

We direct attention first to the interpretation of the language employed in the Illinois long-arm statute. *Gray* v. *American Radiator and Sanitary Corp.* (1961), 22 Ill. 2d 432, 176 N.E.2d 761, a leading and often cited case in the application of a state long-arm statute relating to a tortious act, construed the Illinois statute to include injuries suffered in this state by Illinois residents as a result of defective products manufactured outside this state. *Gray* relied on the theory that, for purposes of jurisdiction, the place of injury is the place of a tortious act. Nothing in *Gray,* however, precludes Illinois courts from using the state long-arm statute to acquire jurisdiction based on the commission of a tortious act where the injury is a product-liability case was not suffered in Illinois. The *Gray* opinion does not foreclose this court from concluding that a "tortious act" was committed in Illinois within a meaning of section 17(1)(b) of the long-arm statute, even though the injury occurred outside Illinois.

Gray did not hold that a "tortious act," as those words are used in the statute, cannot occur before the injury is suffered and a cause of action exists. In fact, *Gray* recommended a flexible application of the long-arm statute. In referring to the legislative intent in employing the term "tortious act," the court there said:

> "We think the intent should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the

> test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature. As we observe in *Nelson* v. *Miller,* 11 Ill. 2d 378, the statute contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause." *Gray,* at 436.

And, in the earlier case of *Nelson* v. *Miller* (1957), 11 Ill. 2d 378, 143 N.E.2d 673, the court considered the word "tortious" as used in the long-arm statute:

> "The word 'tortious' can, of course, be used to describe conduct that subjects the actor to tort liability. For its own purposes the Restatement so uses it. (Restatement, Torts, § 6.) It does not follow, however, that the word must have that meaning in a statute that is concerned with jurisdictional limits. To so hold would be to make the jurisdiction of the court depend upon the outcome of a trial on the merits. There is no indication that the General Assembly intended a result so unusual. The essential question in cases of this type is where the action is to be tried. Once it has been determined that the relationship of the defendant to the State is sufficient to warrant trial here, we are of the opinion that the court has jurisdiction to determine the merits of the controversy, and that its jurisdition will not be destroyed by its exercise." *Nelson,* at 392.

We interpret *Nelson* to mean that the words of the statute are subject to a variety of interpretations—a not unusual feature of the judicial process. (See *Application of County Collector* (1976), 44 Ill. App. 3d 327, 331-332, 357 N.E.2d 1302.) The court also observed in *Nelson:*

> "The substantial objective of the new jurisdictional provisions is to enable the plaintiff to obtain a trial of the issues of liability and of damages in the State, when the circumstances make it the appropriate and convenient forum for that purpose." *Nelson,* at 393.

This analysis favoring a flexible approach is supported by *Braband* v. *Beech Aircraft Corp.* (1977), 51 Ill. App. 3d 296, ... N.E.2d ....., which is similar to the case before us inasmuch as the place of injury there was also outside Illinois. *Braband* involved a 5-year-old plane which Beech designed and manufactured; the plane was previously sold to firms located in Texas and Nevada, and later sold to a business in Illinois, where the plane was based. The aircraft took off from Illinois for a trip to England for delivery to its purchaser, but crashed while approaching an airport in the northwest territories of Canada. The plaintiffs, executors of the estates of the deceased pilots, sued Beech in Illinois, charging both that vital parts of the plane were not reasonably safe as manufactured by Beech, and that the plane was not aerodynamically sound. The plane had not been manufactured in Illinois and Beech had no connection with the sale of the plane to anyone in Illinois or its presence in Illinois before being flown to England. Beech responded that it had neither committed a tortious act in Illinois nor transacted business here.

The two majority opinions in the case upheld jurisdiction in Illinois based on different theories. One of the opinions concluded that Beech committed a tortious act within Illinois. The second majority opinion concluded jurisdiction was proper under section 13.3 of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, par. 13.3) because Beech was doing business in Illinois. The observations of the majority opinion which relied on the "tortious act" provision of the long-arm statute are particularly relevant here:

> "Considering the expansive definition of the word 'tortious' as stated in the case law, I believe that a tortious act was committed by the delivery into Illinois of a plane that was allegedly unreasonably dangerous. A tort to be an actionable wrong, requires a duty, a breach of the duty and an injury. (*Micher* v. *Brown* (1973), 54 Ill.2d 539, 541, 301 N.E.2d 307.) The chain

> culminating in the death of the plaintiffs' decedents began in Kansas with the breach of the duty when the allegedly defective plane was manufactured. That condition persisted until it became a cause of action with the crash in Canada causing the deaths. Between the manufacture and the crash the allegedly defective plane was purchased by an Illinois corporation and was based in Illinois for a period of time. A duty was owed to the residents of Illinois. The injury in the instant case is to the plaintiffs who reside in Illinois. Whether injury or death Illinois has the right to provide redress against those who inflict injuries upon those within the ambit of the State's legitimate protective policy. * * * The word (tortious) considering the history of the word in its context in the Civil Practice Act should include the delivery of the allegedly defective plane." *Braband*, at 301.

Based on these authorities, we conclude that the phrase "commission of a tortious act" as employed in the long-arm statute applies not only to an injury which occurs in Illinois, but also to all elements and conduct which significantly relate to or have significant causal connection with the injury suffered.

One of the elements which plaintiff claims led to his injury is that the Opel car was imported into Illinois with the allegedly defective tire and then sold to plaintiff's father. In a product-liability action, liability is imposed on a manufacturer who places a defective product in the stream of commerce. An element of this cause of action is the distribution of a defective and unreasonably dangerous product. Thus, it is at least as realistic to treat the distribution of such a product in Illinois as a tortious act for the purpose of jurisdiction as to focus on only the consequences of the sale and the place where the product causes injury. Because Illinois had a significant connection with the movement of the tire from Belgium to the place of

injury, and particularly because the allegedly defective tire was shipped to Illinois, the Opel with the defective tire was purchased here by an Illinois resident, and the car and tire were used and maintained in Illinois for a substantial period of time, we conclude that elements of a tortious act sufficient to satisfy the meaning of the long-arm statute took place in Illinois.

In reaching this result we have considered *Williams* v. *Brown Manufacturing Co.* (1970), 45 Ill. 2d 418, 261 N.E.2d 305, on which Englebert relies. In that case, in applying a statute of limitations for injury to the person in a product-liability action, the Supreme Court was concerned with determining when the cause of action accrued. The conclusion we reach in this case, that for the purpose of the state long-arm statute a "tortious act" may be committed before a cause of action accrues and the statute of limitations commences to run, is not inconsistent with *Williams*. Nothing in *Williams* indicates that the interpretation of the long-arm statute is governed by the application of the limitations statute, or requires that the words "tortious act" as used in the long-arm statute be construed to require an injury to occur in Illinois before the courts of this state may acquire jurisdiction.

Three additional considerations buttress the conclusion we reach in construing the statute. First, the long-arm statute of Illinois has been characterized as one which provides jurisdiction over nonresidents to the fullest extent permitted by due process concepts. (*Nelson*, at 389.) Because, as pointed out below, Englebert had sufficient contacts with Illinois to satisfy due process requirements, there is no reason to construe the words "tortious act" as used in the long-arm statute so strictly that assertions of jurisdiction which do not offend due process are limited, rather than expanded to the fullest possible extent the statute will permit.

Second, public policy dictates this result. In our economy, products are advertised for nationwide distribution and sale over the entire country through television, radio and nationally circulated newspapers and periodicals, and distributed throughout our nation. (*Bolf* v. *Wise* (1970), 119 Ill. App. 2d 203, 208, 255 N.E.2d 511.) With automobile and airplane travel commonplace in our society, people move across state lines in vast numbers each year. In such an economic setting, it is at least as logical to construe a long-arm statute to provide jurisdiction in the place where the defective product was purchased and the injured party resides as in the place where, through chance, the product happened to be when it failed. The need for a common-sense solution to the problem of providing a forum in product-liability cases, instead of an ostrich-like reliance on technical concepts of the accrual of an actionable wrong is strikingly demonstrated by Professor David P. Currie's widely-quoted article, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. Ill. L. F. 533.

Finally, the application of the long-arm statute is especially suitable where, as here, Englebert makes no attempt to demonstrate that it would be more inconvenienced by appearing in Illinois than in Colorado. As pointed out in *Gray,* modern "facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other states." (*Gray,* at 442-443.) Not only will Englebert not be physically inconvenienced by responding in Illinois, but it appears that its legal position will not be prejudiced either, for Englebert has conceded in this court that the body of product-liability law in Colorado is substantially comparable to the law of Illinois. In addition, Colorado, like Illinois, appears to adhere to the concept

that the law of the forum having the most significant relationship with the occurrence and with the parties should be applied in preference to the law of the state where the injury occurred. (*Ingersoll* v. *Klein* (1970), 46 Ill. 2d 42, 262 N.E.2d 593; *First National Bank* v. *Rostek* (1973), 182 Col. 437, 514 P.2d 314.) Thus, even if the plaintiff is banished from Illinois, since the Opel was purchased, maintained and driven here during most of its use, it is likely that Colorado courts would conclude that Illinois had the most significant relationship with the parties and would apply Illinois law in deciding this case.

For all these reasons, we conclude that Englebert committed a tortious act in this state within the meaning of section 17(1)(b) of the Civil Practice Act.

In addition to determining that the language of the long-arm statute was satisfied by the events which took place in Illinois, Englebert's appeal also requires us to decide whether it had sufficient minimum contacts with Illinois to satisfy the due process standards applicable to long-arm jurisdiction. Essentially, this depends upon whether it is fair to require Englebert to defend an action here. *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310; *St. Louis-San Francisco Railway Co.* v. *Gitchoff;* see also *Hanson* v. *Denckla* (1958), 357 U.S. 235.

The shipment of a single defective tire into Illinois may be enough to satisfy the minimum contact requirement of due process, but it is not necessary to deal with that question in this case. In opposing Englebert's motion to quash the service of summons, plaintiff offered evidence that in a 4-year period an average of more than 800 Opels with Englebert tires were brought into Illinois annually, and that the estimated number of Englebert tires on Opels in Illinois each year was at least 4,000. Where defendant's product

reaches Illinois in such quantity, it is neither unjust nor unreasonable to require the producer to come to Illinois to defend an action based upon a defect in the product. Englebert knew that its tires would be installed in Opels destined for export to the United States and that some of the Opels equipped with its tires would be sold in Illinois. It was reasonably foreseeable to Englebert that people would be injured if defective tires were attached to Opels sold in Illinois, and it is not inconsistent with due process to subject Englebert to the exercise of jurisdiction by the state where an injured user resides. As long as Englebert's tires were coming into Illinois in substantial numbers as part of a regular and continuing process of distribution, there was enough contact with Illinois to satisfy due process requirements.

Clearly, Englebert here had as much contact with Illinois as did the manufacturer in *Gray,* where the court inferred that defendant's commercial transactions, like those of other manufacturers, resulted in substantial use and consumption in Illinois. In *Gray,* the court concluded that requiring a manufacturer to answer to a suit in a state where it elects to distribute its products for ultimate use does not offend traditional notions of justice. (*Gray,* at 442.) And Englebert had greater and more continuous contact with Illinois than Beech was shown to have had in *Braband.*

We therefore affirm the Circuit Court's order denying the motion to quash service of summons on Englebert.

Uniroyal, Inc. (Uniroyal) is the second defendant. Count I of the amended complaint, based on strict product-liability, alleges that Uniroyal designed and manufactured the tire in question and placed it in the stream of commerce. It further alleges that the claimed defect was present when the tire "left the possession and control of" Uniroyal.

Count II alleges that Uniroyal "was negligent in the design, manufacture and sale" of the tire by failing to inspect the tire properly before it left Uniroyal's possession, by failing to perform adequate tests on the tire and its components, and by failing to maintain proper humidity and other environmental conditions within the manufacturing plant. Uniroyal moved for summary judgment on both counts, and appeals from the denial of its motion. Uniroyal contends it is not liable on either count because it did not design, manufacture or sell the tire. The order entered by the Circuit Court on Uniroyal's motion for a finding to justify the permissive interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a) identifies the question of law raised by Uniroyal's motion for summary judgment as follows:

> "* * * whether a corporate parent who licenses its trademark to its corporate subsidiary is responsible in tort to the user of a product on which the trademark name appears * * * where the owner of the trademark was not the manufacturer of the product, did not sell or distribute that product, but was engaged in the business of manufacturing and selling similar products."

At the time plaintiff's father purchased the Opel, Uniroyal owned 95 percent of Englebert's stock. This enabled Uniroyal to select the seven-man Englebert board of directors. Two of Englebert's directors were directors, officers or employees of Uniroyal. Uniroyal advertises and markets its product nationally in the United States.

The tire which plaintiff claims was defective bore the trademark "UNIROYAL" in block letters. While the tire was labeled "Made in Belgium," it neither bore Englebert's name nor any other markings to indicate it was manufactured by anyone other than Uniroyal. However, at the

time the Opel was purchased, neither plaintiff nor his parents were aware of the make or name of the tires on the car. Accordingly, nothing in the record establishes or suggests that the trademark "UNIROYAL" on the tires induced the plaintiff or his family to purchase or use the automobile.

"UNIROYAL" is a registered trademark of Uniroyal. Uniroyal granted Englebert a non-exclusive license to use the trademark. The license agreement provided Uniroyal was to have knowledge of the goods and manufacturing operations of Englebert associated with its use of the "UNIROYAL" trademark and logo. The agreement also provided that the license of the trademark would terminate at such time as Uniroyal should cease to have the power to exercise management control over that aspect of Englebert's business which made use of the trademark and logo.

The sign outside the Englebert plant in Belgium bears only the name Uniroyal and the Uniroyal logo. Uniroyal and Englebert were parties to a technical service agreement under which Uniroyal undertook to furnish Englebert with consulting and technical information in the areas of engineering and development, including manufacturing methods, processes and formulae. However, there was no evidence that Uniroyal actually controlled or contributed to Englebert's methods, processes or formulae in any way, or that it furnished Englebert with any know-how or procedures relating to the manufacture of tires. Uniroyal has offered uncontroverted evidence that Englebert has operated separately from it, maintaining separate physical facilities and its own books and accounts, and that Englebert has its own banking sources and lines of credit.

Before Uniroyal owned any of the Englebert stock, Englebert was selling its tires to Buick for use on the Opel car. Opel and Englebert jointly developed the type of tire

involved in this case to satisfy performance specifications set by Opel. The design work took place at an Englebert factory in Germany and the tire was manufactured at Englebert's plant in Belgium. No Uniroyal employees were employed at either of these Englebert facilities.

Opel's purchase orders for tires went from Opel to Englebert. All the discussions relating to the purchase of tires for use on Opels occurred in Europe and involved only employees of Opel and Englebert. The decision to use the "UNIROYAL" trademark on the tires manufactured by Englebert originated with Englebert. Uniroyal, therefore, takes the position that despite its 95 percent ownership of Englebert, the two corporations have operated separately and Uniroyal is not responsible for the defect in the tire.

Notwithstanding the "UNIROYAL" trademark on the defective tire and Uniroyal's substantial ownership of the stock of Englebert, there is no evidence that Uniroyal was the designer, manufacturer or seller of the tire. Englebert was not a dummy or sham corporation; nor was it operated as a mere instrumentality of Uniroyal. Plaintiff stated to the Circuit Court that Englebert had "a great deal of autonomy in its day-to-day operations" and states here that Englebert was not a "mere instrumentality." There is no evidence that Englebert was used by Uniroyal as a subterfuge to defeat public convenience, justify wrong or perpetrate a fraud. Englebert was in the business of manufacturing tires long before Uniroyal's acquisition of its stock. Uniroyal and Englebert always operated as separate entities with separate physical facilities and different employees, and the separate corporate existence of Englebert was not disregarded by Uniroyal. Under Illinois law Uniroyal is not vicariously liable for the alleged tortious conduct of Englebert. *Dregne* v. *Five Cent Cab Co.*

(1943), 381 Ill. 594, 46 N.E.2d 386; *Superior Coal Co.* v. *Department of Finance* (1941), 377 Ill. 282, 36 N.E.2d 354; *Davis* v. *John R. Thompson Co.* (1926), 239 Ill. App. 469; *Califf* v. *The Coca Cola Co.* (N.D. Ill. 1971), 326 F. Supp. 540.

The complaint does not allege that Uniroyal negligently supervised the use of its name, resulting in the injury to plaintiff. Also, since Uniroyal took no part in and did not contribute to the design, manufacture or sale of the tire in question, there is no basis for the allegation that Uniroyal is liable for negligence in its design, manufacture or sale.

Plaintiff also fails on his strict product-liability theory because Uniroyal was neither the manufacturer of the tire nor a participant in any distribution or sale which placed the tire in the stream of commerce. The plaintiff relies on several cases in which the owner of a trademark affixed to a product was held accountable in strict tort liability. It is unnecessary to discuss these cases at length, except to point out that in all of them, with the exception of *Kasel* v. *Remington Arms Company* (1972), 24 Cal. App. 3d 711, 101 Cal. Rptr. 314, the trademark owner itself either manufactured the product, supplied the process used in manufacturing the product, or sold the product to which a trademark has been affixed.

The only case plaintiff cites which does not involve the seller of a product is *Kasel,* which presented a product-liability claim relating to ammunition manufactured by a Mexican subsidiary of the defendant, Remington Arms. *Kasel* is distinguishable from the case before us for several reasons. In that case, Remington used its subsidiary as a mere instrumentality. Remington not only created the subsidiary but also managed it by a Remington employee who reported directly to the vice president of Remington. Remington executives who ran the subsidiary were initially as-

sisted by 18 Remington employees sent to Mexico. The equipment installed in the Mexican plant was procured, delivered and designed by Remington. The shell in which the Mexican gunpowder was contained was manufactured by Remington. Remington substantially financed the facilities in Mexico by purchasing stocks and bonds from the subsidiary.

Based on Remington's total involvement in the subsidiary's operations, the court concluded that Remington organized the subsidiary "for its own [Remington's] aggrandizement." (*Kasel,* at 727.) Finally, to promote purchases of the subsidiary's product by American hunters in Mexico, Remington had advertised the product in California.

In contrast, Englebert was an established company when Uniroyal bought into it. Englebert always has been managed by the Englebert family. Uniroyal has no employees working for Englebert in Belgium. Englebert acquired its own equipment and established the applicable specifications. Englebert provided its own financing, and Uniroyal purchased stock from the Englebert family, not from the subsidiary itself. Unlike Remington, Uniroyal neither involved itself in its subsidiary's corporate life nor participated in the manufacture of its subsidiary's product. Last, Uniroyal's name had nothing to do with the decision of plaintiff or of his family to purchase and use their Opel automobile.

Plaintiff also contends that the provisions of section 400 of the Restatement (Second) of Torts places the same strict product-liability on Uniroyal as if Uniroyal were the manufacturer. As we interpret this section of the Restatement, it was not intended to specifically relate to strict tort liability cases and provides for liability identical to

that of manufacturer only for those who supply a chattel to other by sale, lease, gift or loan. And so long as the record here does not show that Uniroyal played any role in supplying the tire to others, Uniroyal cannot be regarded as "one who puts out a chattel" within the meaning of section 400 as explained by section 400, comment (a). Further, section 400, comment (d) of the Restatement, which covers the precise situation where a party affixes his name or trademark to the product, only states that such a party is responsible on the same basis as the actual manufacturer if he also participates in placing the chattel in the stream of commerce. Moreover, nothing in section 402A, which specifically deals with the doctrine of strict product-liability, suggests that such liability is imposed upon anyone other than a manufacturer, wholesaler, retailer or distributor of a chattel.

If plaintiff's theory is that by permitting its name to be placed on the tire Uniroyal is estopped from denying it was the manufacturer, plaintiff cannot prevail. Under Illinois law such an estoppel is available only to a plaintiff who has relied on the acts or conduct of a defendant which give rise to the estoppel. (*Levin* v. *Civil Service Commission* (1972), 52 Ill. 2d 516, 288 N.E. 2d 97; *Dill* v. *Wildman* (1952), 413 Ill. 448, 456, 109 N.E. 2d 765; *Baldwin* v. *Baldwin* (1974), 21 Ill. App. 3d 380, 315 N.E. 2d 649.) Similarly, if plaintiff's theory is that by permitting its name to be placed on the tire Uniroyal misrepresented the source of the tire, plaintiff would not have stated a cause of action without alleging that he or his father, the purchaser of the automobile, relied on the acts or statements of the defendant. (*Yates* v. *Cummings* (1972), 4 Ill. App. 3d 899, 282 N.E. 2d 261; *Theo. Hamm Brewing Co.* v. *First Trust and Savings Bank* (1968), 103 Ill. App. 2d 190, 242 N.E. 2d 911;

Prosser, Torts, § 108 at 714 (4th ed. 1971)). If plaintiff's theory is that Uniroyal vouched for the tire by permitting its name to be placed on it, thereby associating its good will and responsibility with the tire, Uniroyal's involvement with the tire would be meaningless so far as liability is concerned to a purchaser or user, such as plaintiff, who was not even aware of Uniroyal's connection with the tire.

Plaintiff has not challenged the statement asserted many times by Uniroyal, that the record establishes the absence of any reliance by plaintiff on the Uniroyal name, either when the automobile was purchased or during the car's use. Absent evidence of such reliance, plaintiff cannot be assisted by any theory of estoppel or misrepresentation or by any claim that Uniroyal vouched for the tire.[1] In no sense was Uniroyal or Uniroyal's name on the tires of the automobile a cause of the injury suffered by the plaintiff.

For these reasons, the Circuit Court's denial of summary judgment in favor of Uniroyal on the question of law identified by the Circuit Court must be reversed.

Affirmed in part, reversed in part and remanded for further proceedings.

McNamara and Jiganti, JJ., concur.

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[1] For a recent discussion urging imposition of liability on the trademark owner on a warranty theory see Goldstein, *Products Liability and the Trademark Owner: "When a Trademark is a Warranty"*, 32 Bus. Law. 957 (1977).

Ill. Rev. Stat. ch. 110, § 16. *Personal service outside State.* (1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

§17. *Act submitting to jurisdiction—Process.* (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting;

(e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as pro-

vided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

No. 50358

IN THE
SUPREME COURT OF ILLINOIS

JOHN DARRILL CONNELLY,

Plaintiff-Appellee

vs.

UNIROYAL ENGLEBERT BELGIQUE, S.A., a Belgian corporation,

Defendant-Appellant

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that defendant Uniroyal Englebert Belgique, S.A., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Illinois Supreme Court, which judgment was entered on March 30, 1979 and affirmed the denial of appellant's motion to quash the service of summons herein.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and, alternately, 28 U.S.C. §2103.
Dated: June 14, 1979

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PROOF OF SERVICE

David J. Gibbons, attorney for defendant-appellant, Uniroyal Englebert Belgique, S.A., hereby certifies that copies of the aforesaid Notice of Appeal To The Supreme Court of the United States of Defendant-Appellant, Uniroyal Englebert Belgique, S.A., were served upon each of the following attorneys or all parties who were required to be served:

John E. Norton
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by putting said copies in properly addressed envelopes and placing same in the United States Mail chute located at Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606, at or before 5:00 p.m. on June 14, 1979.

David J. Gibbons

No. 78-1914

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,

Appellant,

vs.

JOHN DARRILL CONNELLY,

Appellee.

On Appeal from the Supreme Court of the State of Illinois

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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Appellant,

VS.

JOHN DARRILL CONNELLY,

Appellee.

On Appeal from the Supreme Court of the State of Illinois

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

Appellant, Uniroyal Englebert Belgique, S.A. ("Englebert Belgique"), pursuant to Rule 16.5 of the Rules of this Court, files this Supplemental Brief in support of its Jurisdictional Statement in order to call to the attention of this Court the recent decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Electric Light & Power Co.* v. *Atlas Corp.* (No. 78-1759, opinion filed 8-22-79).*

* The opinion of the Eighth Circuit is set forth in the Appendix attached to this Supplemental Brief.

In *Iowa Electric*, an action was commenced in a federal district court in Iowa alleging that the defendant, Atlas Corporation, had breached a contract to supply uranium ore to the plaintiff utility. Atlas was a non-resident of Iowa and it challenged the service of process made pursuant to the Iowa Long Arm Statute. Atlas had no contact with Iowa except for a single visit there by its agent during renegotiation of the contract, which visit the Eighth Circuit did not regard "as a significant contact between Atlas and the forum" (App. 2, n. 2). Atlas was, however, aware that its uranium *would ultimately be used* in Iowa.

The contract, which had been negotiated and executed outside of Iowa, provided for delivery of the uranium by Atlas to a facility in Illinois where title passed to the plaintiff. The uranium was processed in Illinois and was then further processed in Tennessee and North Carolina by third parties and was "eventually shipped" from North Carolina to the plaintiff in Iowa (App. 9). Several of the supposed jurisdictional contacts, which that plaintiff attributed to its contract relationship with Atlas and which it *unsuccessfully* sought to establish as sufficient "minimum contacts" with the Iowa forum, are comparable to the supposed jurisdictional contacts upon which the Illinois Supreme Court relied in its assertion of jurisdiction over Englebert Belgique.

Initially, the Eighth Circuit held that Iowa Electric's unilateral acts in that forum (comparable to plaintiff Connelly's activities in Illinois) did not supply the requisite minimum contact by Atlas (App. 4). Next, the Eighth Circuit held that the State of Iowa's supposed "substantial connection" to a uranium contract involving an Iowa utility (comparable to Illinois' interest in an injury to one of its citizens) was not a sufficient interest for

Iowa to provide a forum to resolve that contract dispute. Such an argument did not persuade the Eighth Circuit because Iowa Electric could have sued Atlas in five or six other states (App. 7-8), similar to what plaintiff Connelly has already done by his pending lawsuit against Englebert Belgique in a Colorado court (Jurisdictional Statement, p. 5).

Iowa Electric also argued that Atlas had shipped the uranium to Iowa (comparable to plaintiff Connelly's argument that Englebert Belgique shipped tires to Illinois. The Eighth Circuit determined, however, that Atlas had *not shipped* any product into Iowa since Atlas had no further involvement with the uranium after it had delivered the product in Illinois (App. 9). Similarly, Englebert Belgique had no involvement with the tire after its delivery to Opel in Belgium.

As its final argument, that plaintiff asserted that Atlas' knowledge that its uranium was "destined" to ultimately come into Iowa (comparable to plaintiff Connelly's argument that it was foreseeable that tires would come into Illinois) was a sufficient contact. In *rejecting* that argument, the Eighth Circuit stated:

> "Furthermore, a seller's knowledge that his product is 'destined' in some form for the forum is not necessarily sufficient contact with that state to confer jurisdiction over the seller, particularly in the absence of any other voluntary contacts with the forum state. See also, *Charia* v. *Cigarette Racing Team, Inc.*, 583 F.2d 184, 189 (5th Cir. 1978); *Benjamin* v. *Western Boat Building Corp.*, 472 F.2d 723, 730 (5th Cir.), *cert. denied*, 414 U.S. 830 (1973); *Golden Belt Mfg. Co.* v. *Janler Plastic Mold Corp.*, 281 F.Supp. 368, 370-71 (M.D. N.C. 1967), *aff'd*, 391 F.2d 266 (4th Cir. 1968)."

In the instant situation, Englebert Beligique had no "other voluntary contacts" with Illinois. Moreover, Englebert

Belgique had no knowledge, such as Atlas had, that its product was "destined" for and thereby *would enter Illinois;* rather, Englebert Belgique merely knew that its product *could be used anywhere* in the world.

On the basis of the prior decisions of this Court and the recent decision of the Eighth Circuit in *Iowa Electric*, Illinois' exercise of personal jurisdiction over Englebert Belgique violates the Due Process Clause.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 78-1759

Iowa Electric Light and Power Company,

Appellee,

v.

Atlas Corporation,

Appellant.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: March 12, 1979
Filed: August 22, 1979

Before LAY, ROSS, AND MCMILLIAN, Circuit Judges.

Ross, Circuit Judge.

Plaintiff, Iowa Electric Light and Power Company (Iowa Electric), an electric utility in Cedar Rapids, Iowa, filed this lawsuit in the Northern District of Iowa,[1] seeking injunctive relief and specific performance of a contract under which defendant Atlas Corporation (Atlas) was to supply plaintiff with uranium ore concentrates, i.e., uranium "yellowcake". Atlas submitted a counterclaim for equitable price adjustment after contesting the court's jurisdiction over its person under the Iowa long-arm statute, Iowa Code § 617.3. We hold that the district court

[1] The Honorable Edward J. McManus, Chief Judge, presiding.

erred in overruling the motion to dismiss for lack of personal jurisdiction over Atlas, and we therefore reverse and remand.

I.

Atlas, incorporated in Delaware, has maintained its principal offices in New Jersey since 1977 and previously did so in New York. The company's Minerals Division, which was directly involved in the contract with Iowa Electric, is located in Denver, Colorado with its uranium mining and milling operations primarily in Moab, Utah. Atlas has no agents, employees, offices, or facilities in Iowa and owns no property there. Atlas does not solicit or transact any business in Iowa, nor is it qualified to do business in that state.

Atlas did not initiate the agreement with Iowa Electric which is the subject of this lawsuit. In 1971 Iowa Electric wrote to various uranium producers requesting price quotations and offers to sell specific quantities of natural uranium ore concentrates to be supplied over a period of years. The solicitation of Atlas' bid was mailed to Atlas' offices in New York. The invitations to bid designated Pickard, Lowe & Associates, Inc., a consulting fuel management firm in Washington, D. C., to receive all responses, and Atlas mailed its bid proposal to the Pickard firm in Washington, D. C. Thereafter, the contract between Iowa Electric and Atlas was negotiated in Washington, D.C. and executed by Atlas in New York.[2]

[2] Faced with substantial unforeseen increases in production costs several years after execution of the parties' contract, Atlas sought renegotiation of the contract price provision. Unsuccessful renegotiations and delayed deliveries eventually led to this lawsuit. In the course of these negotiations, an officer of Atlas Corporation entered Iowa for one day. We do not regard this visit as a significant contact between Atlas and the forum.

The contract called for performance by Atlas in Illinois. Atlas was to deliver shipments of uranium ore to sampling and conversion facilities in Metropolis, Illinois designated by Iowa Electric. There, as to each shipment which conformed to specifications, title passed to Iowa Electric, and Atlas had no further obligations under the contract.

II.

Iowa Electric contends that Atlas was "doing business" in Iowa within the meaning of the state's long-arm statute, Iowa Code § 617.3. Section 617.3 states in part:

> If a foreign corporation makes a contract with a resident of Iowa *to be performed in whole or in part by either party in Iowa,* * * * such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such contract * * *.

(Emphasis added.) Iowa Electric urges that it performed payment, record-keeping, ordering and notice functions in Iowa under the contract, and that its own acts satisfy the requirement that the contract "be performed * * * in part by either party in Iowa." We consider this a close question, particularly as the state supreme court has ruled that mere payment of the contract price by an Iowa resident does not constitute "performance" in Iowa within the meaning of Iowa Code § 617.3. *Gravelie* v. *TBS Pacific, Inc.*, 256 N.W.2d 230, 232 (Iowa 1977). Nevertheless, we cannot say that as a matter of state law, Iowa Electric's

additional notice, ordering and record-keeping functions were insufficient "performance" in Iowa under the long-arm statute.

III.

However, while Iowa Electric's unilateral acts in the forum may suffice to invoke the state's long-arm statute, they cannot supply the requisite minimum contacts between Atlas and the forum state so that the assertion of personal jurisdiction over Atlas would comply with traditional notions of fair play and substantial justice. *See International Shoe* v. *Washington,* 326 U.S. 310, 319 (1945). *See also Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,* thus invoking the benefits and protections of its laws.

(Emphasis added.)

Merely entering into a contract with a forum resident does not provide the requisite contacts between a defendant and the forum state. *See Aaron Ferer & Sons Co.* v. *American Compressed Steel Co.,* 564 F.2d 1206, 1211 (8th Cir. 1977).[3] This is particularly true when all elements of

[3] To assess compliance with due process, with respect to jurisdiction in a particular case, the minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state. *Aaron Ferer & Sons Co.* v. *American Compressed Steel Co.,* 564 F.2d 1206, 1211 (8th Cir. 1977). In this and two related cases, *Aaron Ferer & Sons Co.* v. *Atlas Scrap Iron & Metal Co.,* 558 F.2d 450 (8th Cir. 1977) and *Aaron Ferer & Sons Co.* v. *Diversified Metals Corp.,* 564 F.2d 1211 (8th Cir. 1977), we agreed with the United States Court for the District of Nebraska that it could not assert personal jurisdiction over any of the nonresident corporate defendants who had entered into contracts with the Nebraska plaintiff. In each case, the defendants had engaged in a continuous course of dealing with the resident plaintiff for a substantial time, and negotiations involved telephone calls and mailings both originating and received in Nebraska. In addition, the plaintiff prepared payments in Nebraska drawn on a Nebraska bank, and the contracts were prepared in Nebraska, signed by the plaintiff there, mailed to the nonresident defendants for execution and returned to Nebraska. We held these contacts with the forum insufficient because the contracts were not to be performed in Nebraska, the goods did not originate there and were not to be delivered in the forum and the defendants maintained no offices, agents or salesmen in the state.

(footnote continued)

the defendant's performance are to take place outside of the forum. *Id.* at 1210. *See also Barnstone* v. *Congregation Am Echad,* 574 F.2d 286, 288 (5th Cir. 1978); *American Steel, Inc.* v. *Cascade Steel Rolling Mills, Inc.,* 425 F. Supp. 301, 303 (S.D. Tex. 1975), *aff'd,* 548 F.2d 620 (5th Cir. 1977).

Iowa Electric recites several factors which the district court considered sufficient to justify the exercise of jurisdiction over Atlas.

First, the contract designated Iowa law to control interpretation of the parties' agreement. However, the Supreme Court has consistently differentiated factors which affect the choice of substantive law applicable to a controversy from those which permit a court to exercise personal jurisdiction over a nonresident. *See Hanson* v. *Denckla, supra,* 357 U.S. at 254:

> It does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. *The issue is personal*

> *jurisdiction, not choice of law.* It is resolved in this case by considering the acts of the trustee.

(Emphasis added.) *See also Shaffer* v. *Heitner,* 433 U.S. 186, 215 (1977), "we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." *Accord, Kulko* v. *Superior Court of California,* 436 U.S. 84, 98 (1978), "the fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant."

Other courts have specifically rejected the designation of forum law to govern contract interpretation as a basis for long-arm jurisdiction. *See, e.g., Galgay* v. *Bulletin Co., Inc.,* 504 F.2d 1062, 1066 (2nd Cir. 1974):

> Appellant's final contention is without merit. The agreement here provided that the contract was to be governed and interpreted in accordance with New York law, and appellant argues that this provision makes the defendant amenable to suit in New York. It is well established that this choice-of-law provision does not have jurisdictional implications.

See also Telco Leasing, Inc. v. *Marshall County Hospital,* 586 F.2d 49, 51 (7th Cir. 1978); *Barnstone* v. *Congregation Am Echad, supra,* 574 F.2d at 289; *Southern Machine Co.* v. *Mohasco Industries, Inc.,* 401 F.2d 374, 382 (6th Cir. 1968); *Graham Engineering Corp.* v. *Kemp Products Ltd.,* 418 F.Supp. 915, 921 n. 9 (N.D. Ohio 1976).

Next, Iowa Electric relies on the district court's conclusions that the contract in this case had a "substantial connection" with Iowa and that Iowa had expressed a "strong interest in providing a forum" for disputes of this kind. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

In *McGee,* a Texas insurance company was sued in California by the beneficiary of a life insurance policy which had been solicited and executed in California. The Texas company, after assuming the obligations of an Arizona insurance company, sent a letter to California soliciting the policyholder's reinsurance and then mailed to him a reinsurance certificate. The offer to reinsure the policyholder was therefore extended and accepted in the forum state where the policyholder resided and from which he mailed premiums until he died. The contract in the present case, on the other hand, was not solicited, negotiated or executed in Iowa. Nor was it to be performed in Iowa except for certain ministerial acts by Iowa Electric involving notice, ordering and record-keeping.

In *McGee,* the Supreme Court also noted that the forum state had a manifest interest in the protection of resident insureds against nonresident insurance companies refusing to pay claims. This interest was reflected in a special jurisdictional statute which subjected "foreign corporations to suit in California on insurance contracts with residents of that State * * *." *Id.* at 221, 223.

Iowa, on the other hand, has manifested no comparable "particularized interest in trying such cases in its courts by, *e.g.,* enacting a special jurisdictional statute." *Kulko* v. *California Superior Court, supra,* 436 U.S. at 98. Not only is there no special jurisdictional statute in Iowa expressing an interest specifically in contract disputes over fuel, but the Iowa legislature has limited use of its long-arm statute in contract actions generally to those in which the contract was to be performed, at least in part, in Iowa. Iowa Code § 617.3. Iowa is not among those states which "extend long-arm statutes jurisdiction to the full extent

of constitutional authority." *Gravelie* v. *TBS Pacific, Inc., supra,* 256 N.W.2d at 232.[4]

Finally, Iowa Electric contends that Atlas ships its product into the state of Iowa. We disagree. Atlas is responsible for delivering a raw material, uranium oxide (U_3O_8), in solid form ("yellowcake") to a testing facility in Illinois and four to six weeks later to a conversion plant owned by Allied Chemical Corporation in Illinois. Thereafter, the raw material undergoes physical transformations, chemical alterations, commingling with similar material from other sources, and a complex manufacturing process involving three companies in three states, from which, after approximately twelve months, a finished product, fuel bundles, ultimately emerges for shipment into Iowa.

The details of this process are as follows: Atlas delivers "yellowcake" to the Lucius Pitkin plant in Metropolis, Illinois for testing. If the material meets the specifications in the contract between Atlas and Iowa Electric, Atlas then delivers it in Iowa Electric's name to Allied Chemical Corporation in Metropolis, Illinois, where the material is designated to the Iowa Electric account at Allied's facility. At this point, Atlas has completed all of its contract obligations, and title to the yellowcake passes to Iowa Electric.[5]

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[4] Another important factor in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957), was the absence of a readily available forum for "small or moderate individual claimants [who] frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *Id.* at 223. Iowa Electric does not contend that it could not afford to litigate elsewhere or that Atlas would not be subject to suit in, for example, Delaware, New York, Colorado, Utah and perhaps Illinois.

[5] If the material which Atlas delivers to Illinois is defective or fails to meet specifications, this fact is discovered at the Lucius Pitkin plant. Thereafter, others in the finishing or refining process are responsible for meeting any subsequent specifications or other requirements under their separate contracts with Iowa Electric.

Atlas has no further involvement in subsequent refinement or manufacturing processes.

Pursuant to contract between Iowa Electric and Allied Chemical Corporation, the yellowcake is then commingled with ore from other sources, all of which undergoes conversion to a gas, uranium hexafloride (UF_6).

When instructed to do so by Iowa Electric, Allied ships the UF_6 gas to the gaseous diffusion plant in Oak Ridge, Tennessee operated by the United States Energy Research and Development Administration (ERDA). At this stage, pursuant to a separate contract between Iowa Electric and ERDA, the chemical composition of the UF_6 gas is altered by an enrichment process which increases the percentage of a constituent, the U-235 isotope, to a level suitable for use as nuclear fuel. The UF_6 which Allied transports to ERDA is commingled with UF_6 from other sources for the enrichment process.

Then, by a separate contract with Iowa Electric, the General Electric Company (G.E.) receives from ERDA enriched UF_6 at the G.E. nuclear fuel fabrication plant in Wilmington, North Carolina. The fabrication process consists of various functions, i.e., conversion from UF_6 gas to UO_2 powder, pelletizing, rod loading and assembly of fuel bundles. The final manufactured products, fuel bundles, are eventually shipped from North Carolina into Iowa.

The processes from conversion at Allied's facility through fuel fabrication at G.E.'s plant occur over a period of approximately twelve months. Iowa Electric schedules and directs the shipment of these products to and from the intermediary companies based on the timing of its own ultimate need for the finished product. We do not agree, in light of all of these facts, that Atlas ships its material into the state of Iowa.

Furthermore, a seller's knowledge that his product is "destined" in some form for the forum is not necessarily sufficient contact with that state to confer jurisdiction over the seller, particularly in the absence of any other voluntary contacts with the forum state. *See also Charia* v. *Cigarette Racing Team, Inc.*, 583 F.2d 184, 189 (5th Cir. 1978); *Benjamin* v. *Western Boat Building Corp.*, 472 F.2d 723, 730 (5th Cir.), *cert. denied*, 414 U.S. 830 (1973); *Golden Belt Mfg. Co.* v. *Janler Plastic Mold Corp.*, 281 F.Supp. 368, 370-71 (M.D. N.C. 1967), *aff'd*, 391 F.2d 266 (4th Cir. 1968).[6]

We hold that the defendant lacked sufficient minimum contacts with the state of Iowa to support the assertion of jurisdiction over its person. We therefore reverse and remand, directing the district court to vacate its prior judgment and to enter judgment of dismissal in favor of the defendant, Atlas Corporation.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[6] We recently held that a foreign seller, despite its reason to know that its product was ultimately bound for the United States, could not be sued in the state in which its product injured a resident (and thus in any state) because the article had been distributed by intermediaries who made the decisions concerning the product's ultimate customers and use. *See Hutson* v. *Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir. 1978) (en banc). The product in *Hutson* was in the same form when it injured the forum resident as when it had left the defendant and had not undergone the kind of transformation from raw material to finished product through intermediate companies outside of the forum as in this case.

No. 78-1914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,
Appellant,

vs.

JOHN DARRELL CONNELLY,
Appellee.

On Appeal from the Supreme Court
of the State of Illinois

MOTION TO DISMISS OR AFFIRM

~~BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI~~

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Appellee John Darrill Connelly respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Illinois on the grounds that (1) the instant case is not within the scope of this Court's appellate jurisdiction, or, in the alternative, (2) the questions on which the decision of this case depends are not so substantial as to need further argument.

Treating Appellant's Jurisdictional Statement as a Petition for a Writ of Certiorari, Appellee John Darrill Connelly respectfully prays that the petition be denied.

I.

(A) GROUNDS ON WHICH JURISDICTION IS INVOKED

Appellant Uniroyal Englebert Belgique, S.A. (hereinafter called "UEB") contends that this Court has jurisdiction of this case by appeal under 28 U.S.C. § 1257 (2), which provides for review of state court judgments

> "By appeal, where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

Here, UEB was subjected to the jurisdiction of the Illinois courts pursuant to § 17(1)(a) of the Illinois Civil Practice Act (Ill. Rev. Stat. c. 110, § 17(1)(a)), which provides that a defendant subjects itself to Illinois' jurisdiction by "the transaction of any business within this State," where the cause of action arises out of the transaction of that business. UEB's position here and below is that in holding that its acts constituted the "transaction of business" in Illinois, the court deprived UEB of due process of law because such acts did not constitute sufficient "minimum contacts" with Illinois under the standards of the *International Shoe* case and its progeny.

Thus, this case does *not* draw into question the validity of the Illinois long-arm statute, but merely draws into question whether the statute's application to UEB is violative of UEB's rights under the due process clause of the federal Constitution. This is not sufficient to confer jurisdiction under 28 U.S.C. § 1257(2). *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958); *Kulko* v. *Superior Court,* 436 U.S. 84, 90 (1978).

Therefore, the appeal should be dismissed.

(B) QUESTION PRESENTED

UEB's statement of the question presented is argumentative in form and not entirely accurate. The question is whether, on the undisputed facts, UEB has sufficient "minimum contacts" with Illinois to satisfy due process requirements for purposes of jurisdiction, when it places its products in the stream of commerce with knowledge that these products will come to rest and be used in Illinois, and the product in question in fact was sold in Illinois to an Illinois resident and its principal use was in this state, despite the fact that UEB had no direct contact with Illinois and plaintiff's injury occurred in Colorado.

(C) STATEMENT OF THE CASE

In its statement of the case, UEB states that it has not "shipped any products, either directly or indirectly, into Illinois." This is incorrect. UEB sold its tires, including the tire in question, to a subsidiary of General Motors with knowledge that a quantity of these tires would be installed on automobiles which would be exported to the United States, including Illinois. It would require an unrealistically narrow interpretation of this conduct to say that this is not the indirect shipment of products into Illinois.

UEB also states that we have "hypothesized" that several thousand tires manufactured by UEB "may" have been present in Illinois at relevant times. Actually, no one has yet disputed that during such times there was an average of approximately 4,000 UEB tires present in Illinois at any given time. Nor is it disputed that UEB was aware that its tires would be used in quantity in the United States, and therefore in the various states including Illinois.

(D) DECISION BELOW

UEB states that, prior to the decision in the instant case, jurisdiction over a nonresident for a cause of action in tort could be obtained only upon proof that defendant had committed a "tortious act" within the state of Illinois. As we demonstrated in our brief below, using cases both from Illinois and other jurisdictions, jurisdiction in a tort case may be sustained either under the "tortious act" or "transaction of any business" provisions of the Illinois long-arm statute. *Bolf* v. *Wise*, 119 Ill. App. 2d 203, 255 N.E.2d 511, 514 (1970); *Ziegler* v. *Houghton-Mifflin Co.*, 80 Ill. App. 2d 210, 224 N.E.2d 12 (1967); *Buckeye Boiler Co.* v. *Superior Court*, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

UEB also suggests that the Illinois Supreme Court did not rest its decision on any particular provision of the Illinois long-arm statute, but instead merely sustained jurisdiction on due process grounds because UEB had "purposefully invoked the benefits and protections of the law of Illinois." Jurisdictional Statement, p. 8. However, it is clear from the opinion of the Illinois Supreme Court that it sustained jurisdiction under the "transaction of any business" provision of the statute. 389 N.E.2d at 158-161. Moreover, the court's analysis was clearly correct, whether or not it rested its decision on one portion of the statute or another, since the court has consistently interpreted the Illinois statute as extending jurisdiction to the full limits of due process. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E.2d 673, 679 (1957); *Connelly* v. *Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155, 159 (1979).

(E) SUBSTANTIALITY OF THE FEDERAL QUESTION

UEB here states (Jurisdictional Statement, pp. 8-9):

> "As construed by Illinois' highest court, its long arm arm statute now enables Illinois to exercise jurisdiction over a non-resident whose sole contact with that state is the presence there of a product which the nonresident had manufactured and sold outside that state. Nothing else need be shown."

This is not a correct statement of the holding below. Rather, this case merely holds that when a nonresident manufacturer places his products in the stream of commerce, knowing that they probably will be purchased and used in Illinois by Illinois consumers in significant numbers (e.g., 4,000 tires present at a given time), the fundamental fairness concept of the due process clause is not violated when the manufacturer is required to defend an action in Illinois brought by an Illinois resident who was injured allegedly as a result of a defect in one of those products. Perhaps mere presence of the product in Illinois ordinarily would *not* be sufficient, but that was not the case here. We had, in addition, (1) purchase and use in Illinois by an Illinois resident, (2) injury to that Illinois resident, (3) the manufacturer's knowledge and expectation that his product would be purchased and used in Illinois in substantial quantities, and (4) actual presence in Illinois of some 4,000 units of his product having a value of many thousands of dollars.

Thus, neither the pendency in this Court of the *Rush* and *Woodson* cases nor the due process clause as interpreted by this and other courts present a sufficient basis to justify acceptance of the appeal or the granting of certiorari in the instant case. Under well-accepted authority, the decision below does not present a substantial federal question.

(i) The *Rush* and *Woodson* Cases

UEB argues that the issue involved in the instant case is just as significant as in the *Rush* and *Woodson* cases in which this Court has recently noted probable jurisdiction and granted certiorari, respectively. Those cases present much different and more difficult questions than were present here.

Savchuk v. *Rush,* 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted,* ..... U.S. ....., 99 S.Ct. 1211 (1979), involves the assertion of jurisdiction by a Minnesota resident over an Indiana resident in Minnesota for injuries sustained in an accident which occurred in Indiana, solely by garnishment of defendant's insurance policy. Obviously, the decision in that case will have no bearing on this one. Qualitatively and quantitatively, defendant's contacts with the forum state are far less there than here. In addition, that case is a quasi-in-rem proceeding; here, we are dealing with jurisdiction over the person. The purchase of an insurance policy from a company which happens to be doing business in another state is an entirely different act than the placing of one's product in the stream of commerce in contemplation of its use, and the impact of its defect, in the forum jurisdiction.

World-Wide Volkswagen Corp. v. *Woodson,* 585 P.2d 351 (Okl. 1978), *cert. granted,* ..... U.S. ....., 99 S.Ct. 1212 (1979), does not involve a product manufacturer who places his product in the stream of commerce for ultimate sale in the forum state. Moreover, defendants there, the New York area wholesaler and retailer of the auto in question, engaged in no commercial activity in contemplation of Oklahoma "business." A local dealer is in a far different position than a manufacturer who knows and expects that

his product will receive world-wide distribution, and will certainly be purchased in the forum state.

Thus, this Court could rule in favor of defendants in both *Rush* and *Woodson* without in any way undermining the decision of the courts below in the instant case.

(ii) The Due Process Requirement

UEB next argues that the decision of the Illinois Supreme Court below is in violation of the due process standards established by this Court in the *International Shoe, Hanson, Shaffer* and *Kulko* cases. This very issue was fully argued below, and as we demonstrated there, UEB's argument is simply based on a misreading of the applicable law.

International Shoe Co. v. *Washington,* 326 U.S. 310 (1945), was not a product liability case, and thus its facts have little bearing on the instant case. Rather, the importance of *International Shoe* is the *standards* it established. As consistently interpreted by all state and federal courts, *International Shoe* stands for the proposition that in order to subject a nonresident defendant to long-arm jurisdiction, that defendant must have some "minimum contacts" with the forum state, such that requiring it to defend itself there does not offend "traditional notions of fair play and substantial justice." 326 U.S. at 316. The relevant inquiry is whether defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. 326 U.S. at 319; *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958). Although, as the Illinois Supreme Court below recognized, these standards have not been uniformly interpreted and applied in the various state and federal courts, the clear

preponderance of judicial thought in products liability cases has been that a product manufacturer has "invoked the benefits and protections of the law of the forum" when it places its product in the stream of interstate commerce with the knowledge or expectation that the product will likely come to rest in the forum state, and therefore will be purchased and used and have an impact upon citizens of that state. *E.g., Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Keckler* v. *Brookwood Country Club,* 248 F. Supp. 645 (N.D. Ill. 1965); *Buckeye Boiler Co.* v. *Superior Court,* 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969); *Duple Motor Bodies, Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir. 1969); *Omstead* v. *Brader Heaters, Inc.,* 5 Wash. App. 258, 487 P.2d 234 (1971), *aff'd,* 80 Wash. 2d 720, 497 P.2d 1310 (1972); *Gullett* v. *Qantas Airways Ltd.,* 417 F. Supp. 490 (M.D. Tenn. 1975); *Dotterweich* v. *Yamaha International Corp.,* 416 F. Supp. 542 (D. Minn. 1976); *Hardy* v. *Pioneer Parachute Co.,* 531 F.2d 193 (4th Cir. 1976). And while the foreseeable presence of a single product in the forum state may be sufficient, it is abundantly clear that there are sufficient "minimum contacts" when the presence of defendant's product is not an isolated instance, but is part of a volume of business in the forum state from which the manufacturer has profited. See cases cited above.

Thus, the purposeful act requirement of *Hanson,* which UEB so strongly emphasizes, is almost uniformly held to have been met by the manufacturer's conduct in placing his product in the stream of interstate commerce under circumstances in which he can foresee its presence and use in the forum state. That is exactly the situation here.

The vitality of the *International Shoe* standard was recently affirmed by this Court in *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), which extended the "minimum contacts" requirement to cases involving in rem jurisdiction. *Shaffer* is simply inapplicable here, since the courts below clearly applied the minimum contacts test in a manner consistent with the established due process limitations. UEB argues that *Shaffer* supports its position, but this argument is based upon an incorrect reading of the *Shaffer* opinion. UEB cites *Shaffer* for the proposition that the "mere presence" of defendant's property in the forum state is not a sufficient contact for due process purposes. But that is not what *Shaffer* holds. As the majority opinion states, and the concurring and dissenting opinions make clear, the case holds only that the mere presence of defendant's property in the state is not sufficient *where that property is unrelated to the cause of action being litigated.* The principal reason for this is that a defendant could not fairly expect that the mere ownership of stock in a Delaware corporation would subject him to the burden of litigating in Delaware on matters unrelated to the title to that property. But as the majority opinion recognizes,

> "This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be *unusual* for the State where the property is located *not* to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest." 433 U.S. at 207-08 (emphasis added).

Thus, neither explicitly nor implicitly did the Court in *Shaffer* in any way limit or impair the validity of cases such as *Gray* and its progeny. What was missing in *Shaffer,* but is present in cases such as *Gray* and the instant case, is (1) a *nexus* between the property, the defendant, the forum state, and the cause of action, and (2) *foreseeability* by the defendant that his property may be the subject or cause of litigation in the forum state. The cases cited above, among others, clearly establish that a defendant has invoked the benefits and protections of the law of the forum state when it is reasonably foreseeable that his activities may cause consequences in that state, and that he may be sued there. Therefore, UEB's reliance on *Hanson* v. *Denckla* is also misplaced. Moreover, *Hanson* and *Shaffer* are trust and corporate cases; this is a personal injury-product liability case. Very different considerations apply when the case involves the placing of potentially dangerous products into national and international streams of commerce.

In *Kulko* v. *Superior Court,* 436 U.S. 84 (1978), this Court, in overturning California's assertion of jurisdiction over a New York father in a child support case, was careful to point out that this was not a commercial case, that the father received no financial benefit from his child's presence in California, and that the "mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 436 U.S. at 101. The opinion makes clear that the existence of such a commercial benefit would make a different case.

Gray v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961), of which the instant case is but a direct application, is now eighteen years old. As will be seen from the foregoing authorities, as well as the many others which have cited and relied upon it, *Gray* has become the leading case in the United States on jurisdiction over a non-resident defendant in a product liability case. Unlike other long-arm jurisdiction cases which this Court has accepted for review in recent years, the instant case is squarely within the well-established body of precedent consisting of *Gray* and its progeny. Moreover, *Gray* and its progeny, including the instant case, are well within the due process limitations established by this Court in *International Shoe* and the line of cases following it. Therefore, the instant case presents no substantial constitutional question. There is no need to expend the precious time and resources of this Court merely to approve the well-established application of the principles of *International Shoe* to product liability cases such as the instant one.

(iii) Relation To Other Cases

Finally, UEB asserts that the instant case is unique in holding that due process requirements are met on these facts. As we have shown in the preceding section, this assertion is not correct. UEB's argument that the mere presence in the forum state of its product is insufficient to support jurisdiction is irrelevant, since this case is not that situation. This case involves the purposeful act of placing defendant's product in the stream of international commerce under circumstances where it is foreseeable that the product will be sold and used in Illinois in significant quantities, plus the actual purchase and use of the product in Illinois by an Illinois resident with the resulting in-

jury to that resident, plus the actual presence in Illinois of a substantial volume of UEB's product pursuant to its marketing scheme.

The few cases cited by UEB (Jurisdictional Statement, p. 16, nn. *, **) generally involve more restrictive long-arm statutes than that of Illinois, or more restrictive constructions of the particular long-arm statute than is constitutionally required.

Let us examine the three cases upon which UEB principally relies. With respect to *Fisons Ltd.* v. *United States,* 458 F.2d 1241 (7th Cir. 1972), *cert. denied,* 405 U.S. 1041 (1972), the statement in the opinion that jurisdiction would not be present if the English manufacturers were simply manufacturers whose products are resold in the forum was, of course, dictum, since the court found jurisdiction. Second, that statement may be literally true, but as we have shown that is not the case here. Third, the statement is of doubtful value, since the court there applied standards from an Illinois case (*Grobark*) which, it is generally agreed, did not survive the *Gray* decision.

Hutson v. *Fehr Bros., Inc.,* 584 F.2d 833 (8th Cir. 1978), *cert. denied,* ..... U.S. ....., 99 S.Ct. 573, a 4-3 decision, involved a defendant who was not the product's manufacturer. More importantly, the court there found that the defendant had no reason to contemplate that its product would be resold in the forum state, and the decision turned on that fact. Even so, Judge Lay, dissenting, was able to state that "I am aware of no other federal or state decision which is in accord with the restrictive holding set out today." 584 F.2d at 840.

As to *Hapner* v. *Rolf Brauchli, Inc.,* 400 Mich. 160, 273 N.W.2d 822 (1978), we do not read that decision the same

as does UEB. The Michigan Supreme Court was badly divided, but it appears that five of the seven judges either found jurisdiction to exist or voted to remand the case for further proceedings to allow plaintiff to establish additional jurisdictional facts. Again, to the extent that some of the judges found an insufficient basis for jurisdiction, it was because they concluded that the product manufacturer had no reason to know that his product would be distributed or sold in Michigan. The opposite is true in the instant case.

UEB suggests that this Court, in effect, retreat to the days of *Pennoyer* v. *Neff,* when territorial limitations on the power of the states were rigidly observed and physical presence, or at least direct activity, of the defendant in the forum state was required. UEB would have this Court ignore the growth of long-arm jurisdiction which has taken place in this country since *International Shoe,* which has clearly established that the minimum contacts required may be as indirect as they are here, in keeping with the realities of the modern marketplace.

In addition, UEB would have this Court contract the jurisdiction of state courts, despite the fact that the weight of responsible opinion is that state courts should have the predominant role in litigation of this type and the role of federal courts should be restricted. Inevitably, the rule for which UEB argues would have the opposite effect.

II.

CONCLUSION

Wherefore, Appellee John Darrill Connelly respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and

also that this cause is not within the appellate jurisdiction of this Court, and therefore respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Illinois Supreme Court.

In the alternative, treating Appellant's Jurisdictional Statement as a Petition for a Writ of Certiorari, the Petition presents no substantial federal question, and therefore Appellee respectfully prays that the Petition be denied.

Respectfully submitted,

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No. 78-1914

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,

Appellant,

vs.

JOHN DARRILL CONNELLY,

Appellee.

On Appeal from the Supreme Court of
the State of Illinois

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellant, Uniroyal Englebert Belgique, S.A. ("Englebert Belgique"), pursuant to Rule 16.4 of the Rules of this Court, files this Brief in Opposition to Appellee's Motion to Affirm in order that several misstatements made in that Motion may be rectified.

STATEMENT OF THE CASE

Appellee misstates the Record when he asserts that Englebert Belgique sold tires "pursuant to its marketing scheme" and with the "knowledge and expectation" that they would be used in Illinois (Motion to Affirm, pp. 3, 5, 8, 12).

The Illinois Supreme Court made no such finding since there is no proof to support such a claim. The only proof on that issue is the testimony of Englebert Belgique, through its president, that "we never know where our tires could" be used.* Nothing relating to the tire, after its sale by appellant in Belgium, involved Englebert Belgique since the tire's use and distribution were undisputedly controlled solely by General Motors (Jurisdictional Statement, App. 2). Accordingly, appellee has not, and cannot, controvert the fact that Englebert Belgique had no contract or distributor relationship with anyone in Illinois, and it never aimed or directed any marketing effort into Illinois.

DECISION BELOW

Appellee concedes that the Illinois Supreme Court did not hold that Englebert Belgique committed a tortious act in Illinois (Jurisdictional Statement, p. 7). Appellee, however, incorrectly asserts that the Illinois Supreme Court found that Englebert Belgique had transacted business in Illinois (Motion to Affirm, pp. 2, 4). Subsequent to the Petition for a Rehearing filed by appellant with the Illinois Supreme Court, the modified opinion of that court expunged any reference to transaction of business by Englebert Belgique and merely concluded that Englebert Belgique's conduct somehow satisfied the requirements of due process (Jurisdictional Statement, App. 7-11).

SUBSTANTIALITY OF THE FEDERAL QUESTION

In *Rush* v. *Savchuk,* 245 N.W.2d 624, 272 N.W.2d 888 Minn.) *prob. juris* noted, ... U.S. ....., 99 S.Ct. 1211 (1979) (No. 78-952), this Court will consider whether a

* Excerpts of Record on Appeal in Illinois Supreme Court; Dep. of A. Englebert, pp. 23-24.

Minnesota state court can require a non-resident to defend a tort claim in Minnesota where the tort occurred outside Minnesota. In *World Wide Volkswagen Corp.* v. *Woodson,* 585 P.2d 351 (Okla. 1978), *cert. granted,* ..... U.S. ....., 99 S.Ct. 1212 (1979) (No. 78-1078), this Court will consider whether an Oklahoma court can require a New York retailer to come to Oklahoma to defend a tort claim.

Appellee's assertion that the forthcoming decision of this Court, on those obviously comparable issues, "will have no bearing on this" case (Motion to Affirm, p. 6), is absurd. This Court has heretofore not reviewed the question of long arm jurisdiction in a personal injury situation. Since the critical elements in *Rush* and *Woodson* are so similar to the instant situation, this Court's discussion of the requirements of due process applicable to tort litigation should be applied by the Illinois Supreme Court before the instant jurisdictional issue is finally resolved.

DECISIONS BY OTHER COURTS

Appellee asserts (Motion to Affirm, p. 11) that the instant exercise of personal jurisdiction by the Illinois court over a non-resident for an out-of-state tortious act (where the non-resident's only contact with the forum was the presence of a previously manufactured product) is *not a unique* holding and construction of the Due Process Clause, as Englebert Belgique had demonstrated in its Jurisdictional Statement (pp. 15-19).

No decision has been cited to this Court nor has appellee ever cited any decision to the lower courts which has so expanded the reach of the long arm jurisdiction by any state. Most certainly, appellee's string citation of decisions (Motion to Affirm, p. 8) does not support the holding of the Illinois court since *every* cited decision involved a *tort which had occurred within the forum state.*

Moreover, the recent decisions of the *en banc* Eighth Circuit in *Hutson* v. *Fehr Bros. Inc.*, 584 F.2d 833 (8th Cir.) *cert. denied,* ..... U.S. ....., 99 S.Ct. 573 (1978) and of the Supreme Court of Michigan in *Hapner* v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W.2d 822 (1978) (Jurisdictional Statement, p. 17) are directly contrary to the instant holding by the Illinois Supreme Court. Those courts correctly determined that the Due Process Clause prevents a state from exercising personal jurisdiction over a foreign manufacturer, who has never marketed in the state or made any decision to sell there, even though the manufacturer's product happened to be used in that state.

Appellee fails to acknowledge, let alone address, the obvious and substantial difference between a non-resident defendant who was merely aware that someone else *might* take a product anywhere in the world, including the forum state, and a non-resident defendant whose conduct established a "purposeful availing" of the benefits and protections of the forum state. That difference was the basis for the holdings by the Eighth Circuit and the Michigan Supreme Court; mere foreseeable presence does not satisfy the requisite purposeful availing.

Due process has, therefore, not been satisfied merely because a non-resident's product at some time happened to be brought into the forum state.

Respectfully submitted,

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